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Third report on diplomatic protection

by Mr. John Dugard, Special Rapporteur

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A. Introduction*

1. Present state of the study on diplomatic protection

1. The International Law Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development.[1] In the same year, the General Assembly, in its resolution 51/160 of 16 December 1996, invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments might wish to make. At its forty-ninth session, in 1997, the Commission, pursuant to the above General Assembly resolution, established at its 2477th meeting a Working Group on the topic.[2] At the same session the Working Group submitted a report which was endorsed by the Commission.[3] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for the consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur.[4]

2. At its 2510th meeting, on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic. The General Assembly, in paragraph 8 of its resolution 52/156 of 15 December 1997, endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

3. The Commission considered the preliminary report (A/CN.4/484) of the Special Rapporteur at its 2520th to 2523rd meetings, from 28 April to 1 May 1998.

4. At its 2534th meeting, on 22 May 1998, the Commission established an open-ended Working Group, chaired by Mr. Bennouna, Special Rapporteur of the topic, to consider possible conclusions that might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission. The Working Group held two meetings, on 25 and 26 May 1998. As regards the approach to the topic, the Working Group agreed on the following, inter alia:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on the topic;

(b) The topic would deal with secondary rules of international law relating to diplomatic protection; primary rules would only be considered when their clarification was essential to providing guidance for a clear formulation of a specific secondary rule;

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* The Special Rapporteur wishes to acknowledge, with gratitude, the assistance of Ms. Zsuzsanna Deen-Racsmány, a Ph.D. student at the University of Leiden, in the preparation of this report.

[1] *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), para. 248, and annex II, addendum I.

[2] *Yearbook ... 1997*, vol. II (Part Two), chap. VIII.

[3] Ibid. para. 171.

[4] Ibid. paras. 189-190.

(c) The exercise of diplomatic protection was the right of the State. In the exercise of that right, the State should take into account the rights and interests of its national for whom it was exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and providing them with more direct and indirect access to international forums to enforce their rights.

5. At its 2544th meeting, on 9 June 1998, the Commission considered and endorsed the report of the Working Group.

6. In 1999, Mr. Bennouna resigned from the Commission. On 14 July 1999, the Commission, at its 2602nd meeting, elected the author of the present report as Special Rapporteur on the topic of diplomatic protection.

7. At its fifty-second session, in 2000, the Commission considered the present Special Rapporteur's first report (A/CN.4/506 and Corr.1 and Add.1). The Commission deferred its consideration of A/CN.4/506/Add.1 to the fifty-third session, due to the lack of time. At the same session, the Commission established an open-ended Informal Consultation, chaired by the Special Rapporteur, on draft articles 1, 3 and 6.[5] The Commission subsequently decided, at its 2635th meeting, to refer draft articles 1, 3 and 5 to 8 to the Drafting Committee together with the report of the Informal Consultation.

8. At its fifty-third session, in 2001, the Commission considered the remainder of the Special Rapporteur's first report (A/CN.4/506/Add.1) as well as his second report (A/CN.4/514 and Corr.1). The Commission discussed document A/CN.4/506/Add.1 at its 2680th and 2685th to 2687th meetings, held on 25 May and from 9 to 11 July 2001, respectively. The Commission also considered the second report of the Special Rapporteur at its 2688th to 2690th meetings, from 12 to 17 July 2001. Due to the lack of time, the Commission was only able to consider those parts of the second report covering draft articles 10 and 11, and deferred consideration of the remainder of document A/CN.4/514, concerning draft articles 12 and 13, to the fifty-fourth session.

9. The Commission decided to refer draft article 9 to the Drafting Committee, at its 2688th meeting, on 12 July 2001, as well as draft articles 10 and 11, at its 2690th meeting, on 17 July 2001.

10. The Drafting Committee has not yet had the opportunity to examine any of the draft articles referred to it. It is expected that the Committee will commence work on these draft articles at the fifty-fourth session of the Commission.

2. The approach of the Special Rapporteur

11. Diplomatic protection is a subject on which there is a wealth of authority in the form of codification, conventions, State practice, jurisprudence and doctrine. Indeed, it is probably true to say that there is no other branch of international law which is so rich in authority. This does not, however, mean that there is necessarily clarity or certainty on the rules governing diplomatic protection in general or the exhaustion of local remedies in particular. On the contrary, the authorities are

[5] The report of the informal consultation is contained in *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 495.

frequently inconsistent and contradictory and point in several directions. In these circumstances the task of the Commission is to choose between competing rules. In exercising this choice it should be guided both by the weight of the authorities in support of a rule and the fairness of the rule in contemporary international society. While the Commission's task is largely that of codification, it does nevertheless progressively develop the law in exercising its choice between rival rule claims.

12. The function of the Special Rapporteur is not to dictate a particular rule to the Commission. Instead his function is to lay all the authorities and options before the Commission so that it may choose the appropriate rule. The Commission and not the Special Rapporteur is the decision maker. On occasion the Special Rapporteur presents several options to the Commission. In most instances, however, the Special Rapporteur proposes a particular rule which he believes to be most suitable in all the circumstances. Competing rules or formulations of the rule are included in the explanatory part of this report together with the authorities in support of such a rule so that the Commission may make an informed choice if it prefers an option not proposed by the Special Rapporteur.

3. Future direction of the draft articles

13. The first report on diplomatic protection dealt principally with the nationality of claims, while the second report introduced the exhaustion of local remedies rule. The present (third) report is confined to two draft articles: article 14, which examines the circumstances in which local remedies need not be exhausted; and article 15, which considers the burden of proof in the application of the local remedies rule. The Special Rapporteur aims to produce an addendum (or two separate addenda) to the present report on two controversial topics which have featured prominently in the history and development of the local remedies rule: the Calvo Clause and the denial of justice. The Special Rapporteur is aware of the opposition in certain quarters to the inclusion of a provision on denial of justice in the draft articles on diplomatic protection on the ground that this concept belongs largely (but certainly not exclusively) to the realm of primary rules.[6] Despite this, the Special Rapporteur believes that the Commission must properly decide whether to include such a provision as is as central to the study of the local remedies rule as is the Prince of Denmark to *Hamlet*. Diplomatic protection is a topic with deep roots in the history and jurisprudence of Latin America. Much of this history has been concerned with the scope and content of the concept of denial of justice and the legal consequences of the Calvo Clause. No proper study on diplomatic protection can therefore avoid consideration of these topics.

14. A key component of the nationality of claims has yet to be considered in the draft articles: the nationality of corporations. Several articles will be introduced on this subject, in the fourth report. Time permitting, the Special Rapporteur proposes that a working group consider tentative suggestions on this subject in the second part of the current session.

15. When the draft articles referred to in paragraph 14 have been considered, this will complete the study of the secondary rules of diplomatic protection in their traditional context. The Special Rapporteur proposes that the Commission should not seek to extend the scope of the draft articles beyond matters normally and

[6] See second report on diplomatic protection, A/CN.4/514, para 10.

traditionally viewed as belonging to the nationality of claims and the exhaustion of local remedies. If this proposal is accepted, it should be possible to complete the present study, both at first and second reading, by the end of the present quinquennium.

16. Suggestions have been made that the present draft articles should be expanded to include a number of matters linked to the nationality of claims that do not traditionally fall within this field. These include:[7] (a) functional protection by international organizations of their officials;[8] (b) the right of the State of nationality of a ship or aircraft to bring a claim on behalf of the crew and possibly also of the passengers of the ship or aircraft, irrespective of the nationality of the individuals concerned;[9] (c) the case where one State exercises diplomatic protection of a national of another State as a result of the delegation of such a right; and (d) the case where a State or an international organization administers or controls a territory.

17. The Special Rapporteur is opposed to the expansion of the draft articles to include such matters. He is particularly opposed to the inclusion of functional protection in the present study. That is a complex topic that would take the Commission beyond diplomatic protection as it is traditionally understood and ensure that the completion of the present draft articles within the present quinquennium became impossible. This is not to say that functional protection is not an important subject. It certainly is. However, it is suggested that if the Commission believes that this topic should be considered it should do so as a separate study. The Special Rapporteur would welcome such a decision, as such a study would draw on the present articles and complement them. During the previous quinquennium this issue was frequently raised, with a clear majority of members opposed to the inclusion of functional protection in the present study. The time has come for an immediate and final resolution of the matter.

B. Exceptions to the general principle that local remedies must be exhausted

Article 14
Local remedies do not need to be exhausted where:

(a) the local remedies:

– are obviously futile (option 1)

– offer no reasonable prospect of success (option 2)

– provide no reasonable possibility of an effective remedy (option 3);

(b) the respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

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[7] *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), para. 183.

[8] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, 1949 *I.C.J. Reports*, p. 174.

[9] See *The M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal for the Law of the Sea, judgment of 1 July 1999, para. 172, reprinted in (1999) 38 *I.L.M.* p. 1323, at p. 1387, also obtainable from www.itlos.org.

(c) there is no voluntary link between the injured individual and the respondent State;

(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

(e) the respondent State is responsible for undue delay in providing a local remedy;

(f) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.

1. Futility (article 14 (a))

Article 14
Local remedies do not need to be exhausted where:

(a) the local remedies:

– are obviously futile (option 1)

– offer no reasonable prospect of success (option 2)

– provide no reasonable possibility of an effective remedy (option 3);

...

Preliminary remarks

18. The second report on diplomatic protection to the Commission proposed in Article 10[10] that a State might not bring an international claim arising out of an injury to a national before the injured individual had exhausted "all available local legal remedies". In debates in both the Commission and the Sixth Committee of the General Assembly, it was suggested that this provision should be amended to require the exhaustion of "all available *adequate and effective* local legal remedies". This suggestion was understandable as the Second Report had made no reference to the requirement that remedies should be "effective" (or that they not be "ineffective") other than in paragraph 67 dealing with "Future work", which served notice that the matter would be dealt with in the third report.

19. There is no objection to including a reference to the need for adequate and effective available remedies in article 10, provided a separate provision deals with the subject of ineffective or futile remedies. As shown in article 15, the burden of proof in respect of the availability and effectiveness of local remedies will in most circumstances be on different parties. The respondent State will be required to prove that local remedies are available, while the burden of proof will be on the claimant State to show that such remedies are ineffective or futile. Ineffectiveness therefore belongs to the category of exceptions to the local remedies rule and is treated as such in this provision.

20. A local remedy is ineffective when it is "obviously futile"/"offers no reasonable prospect of success"/ or "provides no reasonable possibility of an effective remedy". These phrases are more precise than the generic term "ineffective" and are therefore preferred by courts and writers in describing the

[10] A/CN.4/514, sect. B.

phenomenon of the ineffective local remedy. The test of "obvious futility" is higher than that of "no reasonable prospect of success", while the test of "no reasonable possibility of an effective remedy" occupies an intermediate position. All three options are presented for the consideration of the Commission. All enjoy some support among the authorities.

21. Denial of justice is a concept that belongs largely to the realm of the primary rule. It is, however, inextricably linked with many features of the local remedies rule, including that of ineffectiveness, and as such may be said to have a secondary character. As suggested in the Second Report,[11] it may be seen as a secondary rule when it excuses recourse to further local remedies and as a primary rule when it gives rise to international responsibility. The two faces of denial justice are well illustrated by the articles adopted in first reading by the Third Committee of the 1930 Hague Conference for the Codification of International Law, which in article 9 defined denial of justice as a primary rule when a foreigner "has been hindered by the judicial authorities in the exercise of his right to pursue judicial remedies or has encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice" and then gave it a secondary character in exempting an injured foreigner from exhausting local remedies when he had been subjected to such a denial of justice (article 4 (2)).[12]

22. Every effort will be made to avoid the language of denial of justice in this comment. This will not, however, always be possible, as the local remedies rule and denial of justice are historically intertwined. As appears from the introduction to this report, the place of denial of justice in the present draft articles will be considered in an addendum to the third report.

Introduction

23. There is no need to exhaust local remedies when such remedies are ineffective or the exercise of exhausting such remedies would be futile. The reason for this is that a claimant is not required to exhaust justice in a foreign State "when there is no justice to exhaust".[13] This principle is endorsed by judicial decisions,[14] legal doctrine,[15] State practice[16] and codifications of the local remedies rule.[17] Article 22 of the draft articles on State responsibility adopted on first reading required the

[11] A/CN.4/514, para 10.

[12] Reproduced in F. V. García Amador, First report, in *Yearbook ... 1956*, vol. II, p. 173 at p. 226, Document A/CN.4/96.

[13] *Robert E. Brown claim* (1923), 6 *U.N.R.I.A.A.*, p. 120, at p. 129; US Secretary of State Fish to Mr. Pile, 29 May 1873, in J. B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, vol. 6, p. 677 (hereinafter *International Arbitrations*); *Finnish Ships Arbitration* (1934) 3 *U.N.R.I.A.A.*, p. 1479, at p. 1497.

[14] See the cases referred to above in note 13 and *Panevezys-Saldutiskis Railway* case, 1939 *P.C.I.J. Series A/B*, No. 76, p. 4, at p. 19; *Ambatielos* claim (1956), 12 *U.N.R.I.A.A.* p. 83 at pp. 122-123; *Interhandel* case, 1959 *I.C.J. Reports* p. 6 at pp. 27-29.

[15] See below, particularly notes 53, 54, 59, 60, 64, 66.

[16] For statements on American and British State practice respectively, see *Restatement of the Law of the Foreign Relations Law of the United States*, (Second) (1965), para. 207, cmt. (b) at pp. 615-616; (Third) (1989), Part II, para. 713, cmt. (f) at p. 219; C. Warbrick, "Protection of Nationals Abroad: Current Legal Problems" (1988) 37 *I.C.L.Q.*, p. 1002 at p. 1008.

[17] See below, notes 26, 27, 30, 31. The exception to this is the Guerrero report of 1926, which excused compliance from local remedies only where access to domestic courts was denied to foreigners: (1926) 20 *A.J.I.L.*, p. 176 at pp. 202-203.

exhaustion only of those remedies which are "effective".[18] Although this principle is accepted, its precise formulation is subject to dispute, as will be shown below.

24. The futility of local remedies must be determined at the time at which they are to be used.[19] Moreover, the decision on the futility of such remedies must be made on the assumption that the claim is meritorious.[20]

25. It would seem obvious that the competent international tribunal should decide on the issue of the effectiveness *vel non* of local remedies. As Amerasinghe states:

> "[b]roadly speaking, there are three possible alternatives. The tribunal may accept the word of the claimant State as to the effect of the remedy or it may accept the word of the respondent State or it may investigate the matter on the evidence presented to it and come to its own conclusion. Looking to reason and good sense, it would seem that this is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it. To determine the effect of the remedy an estimate of probabilities has to be made and there is no reason why a tribunal should not be competent to make such an estimate".[21]

This obvious truth may appear to be contradicted by the following dictum of the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway* case:

> "[t]he question whether or not the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which Lithuanian courts alone can pronounce a final decision. It is not for this Court to consider the arguments which have been addressed to it for the purpose of either establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (seizure *jure imperii*) to the act of the Lithuanian Government."[22]

That the Court did not intend to leave the final determination of such matters to domestic courts is, however, clear from its comment in the same judgment that "there can be no need to resort to the municipal courts if those courts have no jurisdiction to afford relief."[23] The view that an international tribunal is the appropriate body to pronounce on questions of futility is confirmed by Sir Hersch Lauterpacht[24] and García-Amador.[25]

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[18] *Yearbook ... 1996*, vol. II (Part Two), p. 60.

[19] C. F. Amerasinghe, "The Exhaustion of Procedural Remedies in the Same Court" (1963) 12 *I.C.L.Q.*, p. 1285 at p. 1312 (hereinafter Exhaustion of Procedural Remedies).

[20] *Finnish Ships Arbitration*, *supra* note 13, p. 1504; *Ambatielos Claim*, *supra* note 14, pp. 119-120. See also G. Schwarzenberger, *International Law*, 3rd ed. (1957), vol. 1, p. 609; G. Fitzmaurice, "Hersch Lauterpacht — The Scholar as Judge" (1961),. 37 *B.Y.I.L.* p. 1, at p. 60; D. P. O'Connell, *International Law*, 2nd ed., (1970), vol. 2, p. 1057; and E. M. Borchard, "The Local Remedy Rule" (1934), 28 *A.J.I.L.*, p. 729 at p. 730.

[21] Exhaustion of Procedural Remedies, *supra* note 19, p. 1307.

[22] See *supra* note 14, p. 19.

[23] Ibid. p. 18.

[24] *The Development of International Law by the International Court* (1958), p. 101. See also C.H.P. Law, *The Local Remedies Rule in International Law* (1961), p. 66.

[25] First report, *supra* note 12, p. 205, para. 169.

Formulating the exception

26. While it is agreed that local remedies need not be exhausted when they are futile or ineffective, there is no agreement as to how this exception is to be formulated. Some choose to formulate it in terms of a denial of justice: local remedies need not be exhausted when there is a denial of justice. Others prefer to require that the remedies be effective, not obviously futile, offer a reasonable prospect of success or provide a reasonable possibility of an effective remedy. These tests will be expounded, after which the principal examples of futility or ineffectiveness recognized by judicial decisions will be considered. Once this has been done, a proposal will be made for the most appropriate formulation of the exception.

27. Early codifications excused compliance with the local remedies rule when there was a denial of justice. As shown above, the articles adopted on first reading by the Third Committee of the Conference for the Codification of International Law at the Hague in 1930 provided that the claimant was excused from exhausting local remedies when he was "hindered by the judicial authorities in the exercise of his right to pursue judicial remedies" or had "encountered in the proceedings unjustifiable obstacles or delays implying a refusal to do justice".[26] The Seventh International Conference of American States held in Montevideo in 1933 likewise excepted "those cases of manifest denial or unreasonable delay of justice" from the local remedies rule.[27] García Amador adopted a similar approach.[28]

28. The simple test of "effectiveness" enjoys some support in codifications. The Institute of International Law stated in its resolution adopted at the Granada session in 1956 that the local remedies rule applied only "if the internal legal order of the State against which the claim is made provides means of redress available to the injured person which appear to be *effective* and *sufficient*."[29] Article 22 of the draft articles on State responsibility adopted by the International Law Commission on first reading requires "effective local remedies" to be exhausted.[30] In a similar vein, Juliane Kokott proposed in her report of 2000 on "Exhaustion of local remedies" to the Committee on Diplomatic Protection of Persons and Property of the International Law Association that the claimant was exempt from the local remedies rule where "for whatever reason, no remedy is available to him, which would effectively redress the violation incurred".[31]

29. The stringent test of "obvious futility" for release from the local remedies rule has its origin in the following statement by Arbitrator Bagge in the *Finnish Ships Arbitration*:

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[26] Ibid., at p. 226. See also Law, *supra* note 24, p. 71.

[27] Reproduced in García Amador, First Report, *supra* note 12, p. 229.

[28] F. V. García Amador, Sixth report, *Yearbook ... 1961*, vol. II, at p. 48, Document A/CN.4/134 and Add.1, articles 18 (2) and 3 (2). See also F. V. García Amador, "State Responsibility" (1958-II), 94 *Recueil des Cours*, p. 421 at p. 452; see further the separate opinion of Judge Tanaka in the *Barcelona Traction, Light and Power Company Limited* case (Second Phase), 1970 *I.C.J. Reports* p. 3 at p. 145.

[29] (1956) 46 *Annuaire de l'Institut de Droit International*, p. 364. Emphasis added.

[30] *Yearbook ... 1996*, vol. II (Part Two), p. 132.

[31] International Law Association, *Report of the Sixty-Ninth Conference* (2000) (hereinafter The Exhaustion of Local Remedies), p. 606 at pp. 629-630.

> "As regards finally the third question, whether the local remedy shall be considered as not effective only where it is obviously futile on the merits of the case which are to be taken into account, to have recourse to the municipal remedy, or whether, as the Finnish Government suggest, it is sufficient that such a step only appears to be futile, a certain strictness in construing this rule appears justified by the opinion expressed by Borchard when mentioning the rule applied in prize cases. Borchard says (a.a. § 383): 'In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.'"[32]

This formulation of the test for exemption from the local remedies rule was subsequently accepted by the majority of the commissioners in the *Ambatielos*[33] arbitration and accords substantially with the strict test expounded in the *Panevezys-Saldutiskis Railway* case — that the ineffectiveness of the remedy be "clearly shown."[34]

30. The "obvious futility" test has been strongly criticized by some writers and was not followed in the *ELSI* case in which a chamber of the International Court of Justice was ready to assume the ineffectiveness of local remedies.[35] Amerasinghe has argued that it was wrong for Arbitrator Bagge to import the strict test expounded in prize cases, arising in the context of war and in respect of which States have special powers of jurisdiction, to the law of diplomatic protection,[36] while Mummery has submitted that the test of obvious futility "contributes very little to precision and objectivity of thought".[37] Amerasinghe adds that:

> "The real objection, however, to the strict criterion enunciated in the *Finnish Ships Arbitration* would seem to lie in the absence of justification for applying such a strict criterion to the resort by aliens to local remedies when, pragmatically speaking, litigants can in normal circumstances be expected not to spend time and money exercising available recourse, if it appears reasonably

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[32] *Supra* note 13, p. 1504. According to Judge Tanaka in his separate opinion in the *Barcelona Traction* case, the local remedies rule "does not seem to require from those concerned a clearly futile and pointless activity" (*supra* note 28, p. 145).

[33] *Supra* note 14, p. 119.

[34] *Supra* note 14, p. 19. This test seems to reflect British practice, which requires that the ineffectiveness of the remedy must be "clearly established". See Warbrick, *supra* note 16, p. 1008. The United States of America, in an opinion by the Department of State of 1930, also required that it be "clearly shown" that local remedies were ineffective: G. H. H. Hackworth, *Digest of International Law* (1943), vol. 5, p. 511.

[35] 1989 *I.C.J. Reports*, p. 14 at pp. 46-47. Here the Chamber stated: "With such a deal of litigation [lasting from 1968 to 1975 before various Italian courts] in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. ... (para. 59); In the present case ... it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden" (para. 62).

[36] "The Local Remedies Rule in an Appropriate Perspective" (1976), 36 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* p. 726 at p. 752 (hereinafter Local Remedies Rule); E. M. Borchard's approval of Arbitrator Bagge's approach in "The Local Remedy Rule", *supra* note 20, pp. 732-733.

[37] "The Content of the Duty to Exhaust Local Remedies" (1964), 58 *A.J.I.L.* p. 389 at p. 401.

> rather than highly probable that they are not likely to succeed. The argument in the case of the alien is even more cogent. In his case what is involved is really not a choice between resorting to remedies and completely failing to secure redress by not so resorting, as is the case with the ordinary litigant. It is a choice between resorting to remedies both at the local level and at the international level and not resorting to remedies at the local level while invoking an international remedy which could result in adequate redress."[38]

31. Exemption from the local remedies rule on the ground of ineffectiveness may be better achieved by a formulation which renders the exhaustion of local remedies unnecessary when the remedies offer no reasonable prospect of success to the claimant. Support for this formulation is to be found in tests which stress the reasonableness of the claimant pursuing domestic remedies. This test is less demanding than that of "obvious futility", which requires evidence not only that there was no reasonable prospect of the local remedy succeeding but that it was obviously and manifestly clear that the local remedy would fail.

32. The clearest support for this test comes from the jurisprudence of the European Commission on Human Rights, which on several occasions has applied the standard of "real" or "reasonable" prospect of success. [39] Commentators are divided as to whether the Commission intended to substitute this test for that of "obvious futility" and have raised doubts about the application of this test to the general law of diplomatic protection.[40] The American Law Institute's *Restatement of the Law (Second) of the Foreign Relations Law of the United States* (1965), provides some support for this test:

> "Exhaustion of a remedy does not require the taking of every step that might conceivably result in a favorable determination, but the alien must take all steps that offer a *reasonable possibility, even if not a likelihood*, of success. ...The expense or delay involved, if substantial in relation to the amount or nature of the reparation sought, may be relevant in determining what steps should reasonably be taken to exhaust the available remedies. The alien is not required to incur substantial expense and delay in trying to invoke a remedy where there is no *reasonable possibility* that the remedy would be available."[41]

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[38] *Supra* note 36.

[39] *Retimag v FRG*, Application No. 712/60, 4 *Yearbook of the European Convention on Human Rights* p. 385 at p. 400; *X, Y and Z v. UK*, Application Nos. 8022/77, 8027/77, 18 *European Commission of Human Rights, Decisions and Reports*, p. 66 at p. 74.

[40] A. A. Cançado Trindade, *The Application of the Rule of Local Remedies in International Law* (1983), p. 97 (hereinafter *Application*); C. F. Amerasinghe, *Local Remedies in International Law* (1990), p. 202 (hereinafter *Local Remedies*).

[41] Para. 207, cmt. (b) at pp. 615-616. Emphasis added. It should, however, be noted that § 208 uses the terms "apparent" and "clearly ineffective". Ibid. at p. 618. Cf. The *Restatement of the Law (Third) of the Foreign Relations Law of the United States* (1989), Part II, para. 713, cmt. (f) at p. 219, which requires United States nationals to exhaust local remedies "unless such remedies are clearly shown inadequate". Earlier statements of United States officials demonstrate a stricter requirement, namely that "there appears no adequate ground for believing that sufficient remedy is afforded", that "[t]he Department ... can not assume that the regularly established courts of a country will not administer justice until *it has been clearly shown* that such is the case" (21 July 1930, opinion of the Solicitor for the Department of State, quoted in Hackworth, *supra* note 34, vol. 5, p. 511), or that "[t]he policy of the Department has always been, and is, not to intervene when the claimant has his day in court, unless the courts are of such a character

33. As shown above,[42] article 22 of the draft articles on State Responsibility adopted by the International Law Commission on first reading simply requires local remedies to be effective. The commentary to the provision does, however, support the "reasonable prospect of success" formulation:

> "From the standpoint of the person with whom that initiative lies, it seems plain that the action to be taken relates to all avenues which offer a *real prospect* of still arriving at the result originally aimed at by the international obligation or, if that has really become impossible, an equivalent result. But it seems equally plain that only avenues which offer such a prospect should be explored."[43]

34. While the "obvious futility" test is too strict, that of "reasonable prospect of success" is probably too generous to the claimant. It seems wiser, therefore, to seek a formulation that invokes the concept of reasonableness but which does not too easily excuse the claimant from compliance with the local remedies rule. A possible solution is to be found in option 3, that there is an exemption from the local remedies rule where "there is no reasonable possibility of an effective remedy before courts of the respondent State". This formulation avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of an effective remedy. This is a stricter test than that of "no reasonable prospect of success", the test employed in some legal systems for refusing leave to appeal to a higher court.

35. This test is adopted from the separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case, in which he stated, after considering the grounds on which it might be doubted that the Norwegian courts could afford any effective remedy:

> "However, these doubts do not seem strong enough to render inoperative the requirement of previous exhaustion of local remedies. The legal position on the subject cannot be regarded as so abundantly clear as to rule out as a matter of reasonable possibility an effective remedy before the Norwegian courts."[44]

A number of writers have endorsed this view.[45] Perhaps the best exposition of the test is given by Sir Gerald Fitzmaurice:

> "... Lauterpacht propounded the criterion of there being a 'reasonable possibility' that a remedy would be afforded, as being the test of effectiveness — or in other words he suggested that no means of recourse can be regarded as futile from the effectiveness standpoint unless there does not appear to be even a reasonable possibility that it will afford an effective remedy. This test is acceptable provided it is borne in mind that what there must be a reasonable possibility of is the *existence* of a possibly effective

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as to preclude hope of possibility of justice ..." (Letter of 27 February 1907 concerning claims against Canada by the Solicitor of the Department, quoted in ibid. at p. 520.)

[42] Para. 28.

[43] *Yearbook ... 1977*, vol. II (Part Two), p. 47, para. 48. See also Law, *supra* note 24, pp. 78-79, who formulates the test as "reasonable expectation of success".

[44] 1957 *I.C.J. Reports* p. 9 at p. 39.

[45] I. Brownlie, *Principles of Public International Law* (5th ed., 1998), p. 499. D. R. Mummery prefers to ask whether the local remedy in question "may reasonably be regarded as incapable of producing satisfactory reparation" (*supra* note 37, p. 401).

remedy, and that the mere fact that there is no reasonable possibility of the claimant *obtaining* that remedy, because his case is legally unmeritorious, does not constitute the type of absence of reasonable possibility which will displace the local remedies rule."[46]

36. The text proposed arguably accords more with the reasoning of Arbitrator Bagge in the *Finnish Ships Arbitration* than that of "obvious futility". This is made clear by Simpson and Fox:

> "The use of such terms as 'obviously futile' and 'obviously insufficient' in relation to rights of appeal is, however, misleading. In the *Finnish Ships* case the arbitrator heard lengthy arguments about the shipowners' right of appeal from the decision of the Arbitration Board of the Court of Appeal and their failure to exercise it, and in his award entered into most detailed reasoning before arriving at the conclusion that the appealable points of law were 'obviously' insufficient to secure a reversal of the decision of the Arbitration Board. *'Obvious' is therefore not to be understood in the sense of immediately apparent.* To judge from the *Finnish Ships* case, the test is whether the *insufficiency of the grounds of appeal has been conclusively, or at least convincingly, demonstrated.*"[47]

This interpretation is consistent with Bagge's own views, expressed in another context, where he argued, referring to the *Finnish Ships* decision, that:

> "it would not be reasonable to require that the private party should spend time and money on a recourse which *in all probability* would be futile ...
>
> Even if the facts alleged by the intervening State in the diplomatic correspondence as to damage caused by an act for which the defendant State is responsible may seem to the international tribunal firmly established, there may be other bases required by the municipal law, which are decisive for the acceptance or dismissal on the national plane of the private claim, and whose existence may be a subject for different opinions. *Only where such a difference of opinion seems reasonably not possible [i.e. where there is no reasonable prospect of success], ... ought an application of the local remedies rule to be held unnecessary by reference to the merits of the claim.*"[48]

37. The objection to the "obvious futility" test that it suggests that the ineffectiveness of the local remedy must be *ex facie* "immediately apparent"[49] is overcome by introducing the element of "reasonableness" into the test. This allows a court to examine whether, in the circumstances of the particular case, an effective remedy was a reasonable possibility. The necessity to do this was stressed by Manley O. Hudson in his dissenting opinion in the *Panevezys-Saldutiskis Railway*

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[46] *Supra* note 20, pp. 60-61. See also M. Herdegen, "Diplomatischer Schutz und die Erschöpfung von Rechtsbehelfen" in G. Ress and T. Stein, *Der diplomatische Schutz im Völker- und Europarecht: Aktuelle Probleme und Entwicklungstendenzen* (1966), p. 63 at p. 70.

[47] *International Arbitrations* (1959), p. 114. Emphases added.

[48] "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders" (1958), 34 *B.Y.I.L.*, p. 162 at pp. 166-167. Emphasis added.

[49] Simpson and Fox, *supra* note 47.

case[50] and by Sir Hersch Lauterpacht in his separate opinion in the *Norwegian Loans* case.[51] The correct approach is admirably put by Mummery:

> "... The international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the State's activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule. This flexibility of approach is consonant with the social function of the rule ... — to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving State is reasonably capable of fulfilling its duty of providing a remedy. Thus the result in any particular case will depend on a balancing of factors. For example, in a situation in which the best local legal advice suggests that it is 'highly unlikely' that further resort to local remedies will result in a disposition favourable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further." [52]

Circumstances in which local remedies have been found to be ineffective or futile

38. *The local court has no jurisdiction over the dispute in question.*[53] This principle has been widely accepted both in jurisprudence and in the literature.[54] The *Panevezys-Saldutiskis Railway* case does not negate this principle. There the court held that it was not satisfied that the courts of Lithuania had no jurisdiction over an "act of State", as argued by Estonia, in the absence of a Lithuanian court decision.[55] On the facts this was an extremely cautious,[56] possibly timid approach, but the Court

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[50] *Supra* note 14, p. 48.

[51] *Supra* note 44, p. 39.

[52] Mummery, *supra* note 37, pp. 400-401. See also Herdegen, *supra* note 46, p. 71.

[53] Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 622; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 197-198; R. Jennings and A. Watts (eds.), *Oppenheim's International Law*, 9th ed., (1992), vol. 1, p. 525; A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (1984), p. 884; Mummery, *supra* note 37, pp. 396-397.

[54] See *Arbitration under Article 181 of the Treaty of Neuilly*, reported in (1934), 28 *A.J.I.L.* p. 760 at p. 789. ("the rule of exhaustion of local remedies does not apply generally when the act charged consists of measures taken by the Government or by a member of the Government performing his official duties. There rarely exist local remedies against the acts of the authorized organs of the State."); R. Gelbtrunk and "Salvador Commercial Co." et al. (1902), 15 *U.N.R.I.A.A.*, p. 467 at pp. 467-477; *Lotti May Incident* (1899), 15. *U.N.R.I.A.A.*, p. 29 at p. 31; Judge Lauterpacht's separate opinion in the *Norwegian Loans* case, *supra* note 44, pp. 39-40; E. M. Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 823 (hereinafter *Diplomatic Protection*); *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 525; Brownlie, *supra* note 45 p. 500; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 197; C. F. Amerasinghe, "Whither the Local Remedies Rule?" (1990), 5 *I.C.S.I.D. Review*, p. 292 at p. 306; E. Jiménez de Aréchaga, "International Responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (1968), p. 531 at pp. 587-588; Verzijl, in (1956) 46 *Annuaire de l'Institut de Droit International* p. 266; *Forests of Central Rhodope* (1933) 3 *U.N.R.I.A.A.*, p. 1405 at p. 1420; *Interhandel* case, *supra* note 14, p. 27; Verdross and Simma, *supra* note 53, p. 883; Law, *supra* note 24, p. 69; Schwarzenberger, *supra* note 20, vol. 1, p. 608.

[55] *Supra* note 14, p. 19.

[56] See Lauterpacht, *supra* note 24, p. 101.

made it clear that it accepted the principle that there was "no need to resort to the municipal courts if those courts have no jurisdiction to afford relief."[57]

39. A necessary corollary of this principle is that it is not necessary to exhaust appellate procedures when the appeal court has limited jurisdiction. Thus in the *Finnish Ships Arbitration* Arbitrator Bagge held that local remedies had been exhausted where the disputed issue was a question of fact and the Court of Appeal had competence to decide questions of law only.[58]

40. *The national legislation justifying the acts of which the alien complains will not be reviewed by the courts.* Where, for instance, legislation has been adopted to confiscate the property of an alien and it is clear that the courts are obliged to enforce this legislation there will be no need to exhaust local remedies. Thus in the *Arbitration under Article 181 of the Treaty of Neuilly*, concerning the confiscation of forests by Bulgaria under a Bulgarian law passed in 1904, Arbitrator Undén held that:

> "The Ministry of Agriculture, in proceeding definitely to confiscate the forests, relied upon the ... Bulgarian law of 1904 according to which all the *yaïlaks* were to be considered as domains of the State. Considering that this law was not modified so as to admit the application of a special regime in the annexed territories, the claimants had reasons for considering as useless any action before the Bulgarian courts against the Bulgarian Treasury."[59]

41. *The local courts are notoriously lacking in independence.*[60] The leading authority in support of this principle is the Robert E. Brown claim. [61] Here the President of the South African Republic, Paul Kruger, had dismissed the Chief Justice for finding in favour of Brown's claims to certain mining rights, and both the President and the legislature of the Republic had denounced the decision of the

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[57] *Supra* note 14, p. 18.

[58] *Supra* note 13, p. 1535. See also Schwarzenberger, *supra* note 20, vol. 1, p. 609; Jiménez de Aréchaga, "International Responsibility", *supra* note 54, p. 588; Brownlie, *supra* note 45, p. 499; Mummery, *supra* note 37, p. 398; Law, *supra* note 24, p. 68.

[59] *Arbitration under Article 181 of the Treaty of Neuilly, supra* note 54, p. 789. See also *Forests of Central Rhodope, supra* note 54, p. 1405; *Ambatielos* claim, *supra* note 14, p. 119; *Interhandel* case, *supra* note 14, p. 28; Amerasinghe, *Local Remedies*, *supra* note 40, p. 198; *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 525; Jiménez de Aréchaga, "International Responsibility", *supra* note 54, p. 589; Law, *supra* note 24, pp. 66, 70; K. Doering, "Local Remedies, Exhaustion of", in *Encyclopedia of Public International Law (E.P.I.L.)*, (1997), vol. 3, p. 238 at p. 240; Schwarzenberger, *supra* note 20, vol. 1, p. 608; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50, para 50.

[60] Jiménez de Aréchaga, *supra* note 54, p. 589; Amerasinghe, *Local Remedies*, *supra* note 40, p. 198; Borchard, *Diplomatic Protection*, *supra* note 54, p. 823 (referring to courts controlled by a hostile mob); *Oppenheim's International Law*, *supra* note 54, vol. 1, p. 525; Brownlie, *supra* note 45, p. 500; *Velásquez Rodríguez* case (1989) 28 *I.L.M.* p. 291, pp. 304-309; M.M. Whiteman, *Digest of International Law* (1967), vol. 8, p. 784; separate opinion by Judge Tanaka in *Barcelona Traction* case (Second Phase), *supra* note 28, p. 147; dissenting opinion by Judge Levi Carneiro in the *Anglo-Iranian Oil Co.* case, 1952 *I.C.J. Reports* 165; Moore, *International Arbitrations*, *supra* note 13, vol. 3, pp. 1655, 1657, 3076 et seq., 4902; ibid., vol. 6, p. 287; Mummery, *supra* note 37, p. 403; Law, *supra* note 24, p. 86; Cançado Trindade, *Application*, *supra* note 40, p. 78; Fitzmaurice, *supra* note 20, p. 59; *Yearbook ... 1977*, vol. II (Part Two), pp. 30-50, para 50; Nguyen Quoc Dinh, *Droit International Public* (eds. P. Daillier and A. Pellet), 6th ed. (1999), p. 776.

[61] *Supra* note 13, p. 120.

Chief Justice. In these circumstances Brown was advised by his counsel that it was pointless to proceed with his claim for damages as the reconstituted High Court was clearly hostile to him.[62] The tribunal that heard the international claim rejected the argument that Brown had failed to exhaust local remedies, holding that "the futility of further proceedings had been fully demonstrated, and that the advice of his counsel was amply justified". It was not necessary, said the tribunal, to exhaust justice "when there is no justice to exhaust".[63]

42. *There is a consistent and well-established line of precedents adverse to the alien.* It is not "necessary again to resort to municipal courts if the results must be a repetition of a decision already given".[64] The mere likelihood of an adverse decision is insufficient: there must be "something more than probability of defeat but less than certainty."[65]

43. *The courts of the respondent State do not have the competence to grant an appropriate and adequate remedy to the alien.*[66]

44. *The respondent State does not have an adequate system of judicial protection.* In *Mushikiwabo and others v. Barayagwiza* a United States District Court held that the local remedies rule could be dispensed with in the case as "the Rwandan judicial system [was] virtually inoperative and [would] not be able to deal with civil claims in the near future".[67] During the military dictatorship in Chile the Inter-American Commission on Human Rights resolved that the irregularities inherent in legal

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[62] For a history of this case, see J. Dugard, "Chief Justice versus President: Does the Ghost of Brown v. Leyds NO Still Haunt our Judges?" (1981), *De Rebus*, p.421.

[63] *Supra* note 13, p. 129.

[64] *Panevezys-Saldutiskis Railway* case, *supra* note 14, p. 18. See also Borchard, *Diplomatic Protection*, *supra* note 54, pp. 823-824; *S.S. Lisman* (1937), 3 *U.N.R.I.A.A.*, p. 1769 at p. 1773; *S.S. Seguranca* (1939), 3. *U.N.R.I.A.A.*, p. 1861 at p. 1868; *Finnish Ships Arbitration*, *supra* note 13, p. 1495; *X v. Federal Republic of Germany* (1956), 1 *Yearbook of the European Convention on Human Rights*, p. 138; *X. v. Federal Republic of Germany* (1958), 2 *Yearbook of the European Convention on Human Rights*, p. 342 at p. 344; *X. v. Austria* (1960), 3 *Yearbook of the European Convention on Human Rights*, p. 196 at p. 202; Jiménez de Aréchaga, "*International Responsibility*", *supra* note 54, p. 589; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 196-197; Brownlie, *supra* note 45, p. 499; Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 622; Mummery, *supra* note 37, p. 402; Law, *supra* note 24, p. 66; Cançado Trindade, *Application*, *supra* note 40; *Restatement (Second)*, *supra* note 16, p. 618, para 208; Doering, *supra* note 59, p. 240; Schwarzenberger, *supra* note 20, vol. 1, p. 609; *Yearbook ... 1977*, vol. II (Part Two), p. 48, para 50.

[65] Amerasinghe, *Local Remedies*, *supra* note 40, p. 196.

[66] *Finnish Ships Arbitration*, *supra* note 13, pp. 1496-1497; *Vélasquez Rodríguez* case, *supra* note 60, pp. 304-309; Borchard, *Diplomatic Protection*, *supra* note 54, p. 332; *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 525; Kokott, The Exhaustion of Local Remedies, *supra* note 31, p. 622; *Yagci and Sargin v. Turkey*, Application No. 16426/90 (1995) *European Court of Human Rights, Reports and Decisions*, No. 319 p, 3 at p. 17 para. 42; *Hornsby v. Greece*, Application No. 18357/91, (1997-II) *European Court of Human Rights, Reports and Decisions*, No. 33, p. 495 at p. 509, para. 37; Mummery, *supra* note 37, pp. 401-402; Cançado Trindade, *Application*, *supra* note 40, pp. 76-78; Verdross and Simma, *supra* note 53, p. 884; Article 19(2)(a) of the 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law, reproduced in L. B. Sohn and R. R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens" (1961), 55 *A.J.I.L.* p. 545 at p. 577; Amerasinghe, *Local Remedies*, *supra* note 40, p. 198.

[67] (1997) 107 *I.L.R.* p. 457 at p. 460.

proceedings under military justice obviated the need to exhaust local remedies.[68] Notions of a fair trial and due process of law carry greater weight in contemporary international law, as a result of the influence of international human rights jurisprudence, than they did in the first 60 years of the twentieth century when many of the seminal decisions on the exhaustion of local remedies were given. This exception to the local remedies must therefore be accorded greater weight today.

Conclusion

45. The above examples of circumstances in which recourse to local remedies has been excused suggests that the claimant is required to prove more than that the local remedies offer no reasonable prospect of success (option 2). On the contrary, they suggest that the claimant must prove their futility. They do not, however, lend support to the test of "obvious futility" (option 1), which suggests that the futility of local remedies must be "immediately apparent".[69] Instead they require a tribunal to examine circumstances pertaining to a particular claim which may not be immediately apparent, such as the independence of the judiciary, the ability of local courts to conduct a fair trial, the presence of a line of precedents adverse to the claimant and the conduct of the respondent State. The reasonableness of pursuing local remedies must therefore be considered in each case.[70] This all points in the direction of option 3: a claimant is not obliged to exhaust local remedies where the courts of the respondent State provide "no reasonable possibility of an effective remedy".

2. Waiver and estoppel (article 14 (b))

Article 14
Local remedies do not need to be exhausted where:

...

(b) the Respondent State has expressly or impliedly waived the requirement that local remedies be exhausted or is estopped from raising this requirement;

46. Sometimes States are prepared to waive the requirement that local remedies be exhausted.[71] As the purpose of the rule is to protect the interests of the State accused

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[68] See also resolution 1a/88, Case 9755, *Ann. Rep. IACom.HR* 1987-88, p. 137; Amerasinghe, *Local Remedies supra* note 40, p. 200; Amerasinghe, "Whither the Local Remedies Rule?", *supra* note 54, p. 307; Borchard, *Diplomatic Protection*, *supra* note 54, p. 822; Mummery, *supra* note 37, p. 404; *Restatement (Second)*, *supra* note 16, p. 618, para 208; Doering, *supra* note 59, p. 239; Schwarzenberger, *supra* note 20, vol. 1, p. 609.

[69] Simpson and Fox, *supra* note 47, p. 114.

[70] Mummery states in this connection:

> "As international jurisprudence develops on this subject, the analysis of cases will call for the best skills of the discipline of comparative law; for the various jurisdictions of the common and civil law have developed differing concepts of what is essential to an effective municipal remedy, and from these concepts criteria may be extracted for the purposes of the international standard involved in the local remedies rule. Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness" (*supra* note 37, p. 404).

[71] There are many reasons why a State may decide on such a course. A State may, for instance, believe that such a course would save time and money. See C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967), p. 207.

of mistreating an alien, it follows that a State may waive this protection itself. The Inter American Court of Human Rights has stated:

> "In cases of this type, under the generally recognized principles of international law and international practice, the rule which requires the prior exhaustion of domestic remedies is designed for the benefit of the State, for that rule seeks to excuse the State from having to respond to charges before an international body for acts which have been imputed to it before it has had the opportunity to remedy them by internal means. The requirement is thus considered a means of defence and, as such, waivable, even tacitly."[72]

47. In practice there would seem to be no prohibition on waiver of local remedies. From a doctrinal perspective it is, however, difficult to reconcile waiver with the substantive approach to the exhaustion of local remedies.[73] The reason for this is clearly spelled out by Amerasinghe:

> "If the rule of local remedies is one of procedure, then such a waiver is truly possible and comprehensible. Since the rule is only a means of establishing the orderly conduct of international litigation, an exception may be made to the rule and steps in the order excluded. The character of the alleged wrong will in no way be affected. It is only the method of settlement that undergoes a change. The wrong which remains the same is conclusively determined and redressed by an international court directly rather than by the usual preliminary court or courts.
>
> "If the rule is one of substance, it would follow that a waiver of the requirement that local remedies should be exhausted would not be possible. The resort to local remedies becomes a material part of the wrong being alleged before the international tribunal. Without that resort there would be no cause of action. If a waiver of the requirement were allowed, no cause of action involving international responsibility could be shown before an international tribunal. Either remedies will have to be exhausted with a *denial of justice* or absence of adequate remedies will have to be proved. To speak of a true waiver is incongruous in such a case.
>
> "The same arguments apply to forfeiture of the benefits of the rule by estoppel or for any other reasons. The rule is dispensed with in this manner before an international tribunal, if after it is forfeited there is still an international wrong which an international tribunal can redress. This can only be so, if the rule is of a procedural character and not if it is substantive. In the same way true exceptions to the rule [e.g. if the remedies are futile] can only be allowed if the international tribunal which is seized of the case has a dispute grounded in international law on which to adjudicate. This is so, only if the rule of local remedies which is not applied in a given case is of a procedural nature."[74]

48. Waiver presents problems for those who advocate a substantive position on the local remedies rule. Probably for this reason there is little discussion of waiver on

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[72] *Government of Costa Rica* case, Inter-American Court of Human Rights, (1984) 67 *I.L.R.*, p. 578 at p. 587, para 26. See also *ELSI* case, *supra* note 35, p. 42, para 50; *De Wilde, Ooms and Versyp* Cases ("Vagrancy Cases"), European Court of Human Rights (1971) 56 *I.L.R.* p. 37 at p. 370, para. 55. See also Cançado Trindade, *Application*, *supra* note 40, p. 133.

[73] See Second report on diplomatic protection, A/CN.4/514, para. 33.

[74] *Supra* note 71, at 207-208.

the part of substantivists,[75] although none deny it. On the contrary, Borchard, a prominent substantivist, admits the possibility of waiver.[76] Writers with leanings in favour of the procedural position have little difficulty in supporting the right of waiver on the part of the respondent State,[77] even in the case of human rights conventions.[78]

49. Waiver of local remedies may take many different forms. It may appear in a bilateral or multilateral treaty entered into before or after the dispute arises; it may appear in a contract between the alien and the respondent State; it may be express or implied; or it may be inferred from the conduct of the respondent State in circumstances in which it can be described as estoppel or forfeiture.

Express waiver

50. An express waiver may be included in an ad hoc arbitration agreement concluded to resolve an already existing dispute or in a general treaty providing that disputes arising in the future are to be settled by arbitration or some other form of international dispute settlement. It may also be included in a contract between a State and an alien. There is a general agreement that an express waiver of the local remedies rule is valid[79] and it has been suggested that this principle is ripe for codification by the Institute of International Law[80] and by the Commission's Special Rapporteur, García Amador.[81]

51. Waivers are a common feature of contemporary State practice and many arbitration agreements contain waiver clauses.[82] Probably the best-known example

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[75] Roberto Ago does not consider waivers in his examination of the local remedies rule. R. Ago, Sixth report on State Responsibility, *Yearbook ... 1977*, vol. II (Part One), p. 3; ibid., vol. II, Part Two, p. 30. See also O'Connell, *supra* note 20, vol. 2, p. 1059.

[76] See, for instance, Borchard, *Diplomatic Protection*, *supra* note 54, pp. 819, 825.

[77] Amerasinghe, Local Remedies Rule, *supra* note 36, pp. 735-736; Law, *supra* note 24, p. 59; F.V. García Amador, Third report, *Yearbook ... 1958*, vol. II, p. 47 at p. 93, document A/CN.4/111; F. V. García Amador, *The Changing Law of International Claims* (1984), p. 466 (hereinafter *Changing Law*); J. C. Witenburg, "La receivabilité des réclamations devant les juridictions internationales" (1932-III), 41 *Recueil des Cours* p. 1 at p. 55; K. Ipsen, *Völkerrecht*, 3rd revised ed. (1990), p. 313; E. M. Borchard, "Theoretical Aspects of the International Responsibility of States" (1929), 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, p. 223 at p. 240 (hereinafter Theoretical Aspects). See *Restatement (Second)*, *supra* note 16, vol. II, p. 620-622, para. 209; Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 613.

[78] Cançado Trindade, *Application*, *supra* note 40, pp. 128-133.

[79] See the writings referred to in *supra* note 77. See also Doering, *supra* note 59, p. 239; H. W. Briggs, "The Local Remedies Rule: A Drafting Suggestion", 50 *A.J.I.L.* (1956), p. 921 at p. 925; Amerasinghe, "Whither the Local Remedies Rule?", *supra* note 54, pp. 293-294; Amerasinghe, *Local Remedies*, *supra* note 40, p. 251; *Oppenheim's International Law*, *supra* note 53, pp. 525-526; Schwarzenberger, *supra* note 20, vol. 1, p. 610; Verdross and Simma, *supra* note 53, p. 883; Herdegen, *supra* note 46, p. 69.

[80] The resolution adopted at its Granada session states that: "The rule does not apply: ... (b) in the event that its application has been set aside by agreement between the States concerned." (*Supra* note 29, p. 315.) See also Bourquin, in (1954) *Annuaire de l'Institut de Droit International* vol. 1, p. 58.

[81] García Amador, Third report, *supra* note 77, p. 55. Article 17 states that the rule of the exhaustion of local remedies "shall not apply if the State has expressly agreed with the alien ... to dispense with local remedies." See also his Sixth report (*supra* note 28, p. 134), article 18, para. 4.

[82] For instance, the 1923 Convention establishing the United States-Mexican Claims Commission (article V) and the 1910 Agreement between the United States and Great Britain, quoted in

is to be found in article 26 of the Convention on the Settlement of Investment Disputes, which provides:

> "Consent of the parties to arbitration under its Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under its Convention."[83]

52. It is generally agreed that express waivers, whether contained in an agreement between States or in a contract between State and alien are irrevocable, even if the contract is governed by the law of the host State.[84]

Implied waiver

53. Waiver of local remedies must not be readily implied. In the *ELSI* case a Chamber of the International Court of Justice stated in this connection that it was

> "unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, *in the absence of any words making clear an intention to do so.*"[85]

Indeed, it has been suggested by Georg Schwarzenberger that there is a presumption against implying a waiver:

> "In such a situation of uncertainty it is necessary to give due weight to three relevant presumptions: the presumption against any implicit waiver of rights, and those in favour of the minimum restriction of sovereignty and the interpretation of treaties against the background of international customary law. All three weigh the scales against any implied waiver of the local remedies rule."[86]

54. Where, however, the intention of the parties to waive the local remedies is clear, effect must be given to this intention. Both judicial decisions[87] and the

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Borchard, Theoretical Aspects, *supra* note 77, p. 240. See also the United States-Canada Lake Ontario (Gut Dam) Arbitration Agreement, article II(2)(c), reproduced in (1965) 4 *I.L.M.* p. 468 at p. 469.

[83] United Nations, *Treaty Series*, vol. 575, p. 159.

[84] *Government of Costa Rica* case, *supra* note 72, p. 587, para. 26: *De Wilde, Ooms and Versyp* cases, *supra* note 72, p. 370, para. 55; Amerasinghe, "Whither the Local Remedies Rule?", *supra* note 54, pp. 294-295; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 252-253; Amerasinghe, Local Remedies Rule, *supra* note 36, p. 737; United Kingdom pleadings in the *Anglo-Iranian Oil Company* case, 1951 *I.C.J. Pleadings* pp. 118-119. *Sed contra* Iran's pleadings in ibid. at p. 501.

[85] *Supra* note 35, p. 42, para. 50. Emphasis added. See also Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 626.

[86] *Supra* note 20, pp. 610-611. See also García Amador, *Changing Law*, *supra* note 77, p. 467; García Amador, Third report, *supra* note 77, p. 47, para. 23; *Salem* case, (1932), 2 *U.N.R.I.A.A.* p. 1165 at p. 1189; Law, *supra* note 24, p. 98; E. Jiménez de Aréchaga, "General course in public international law" (1978-I), 159 *Recueil des Cours* p. 1 at p. 292 (hereinafter General Course); Cançado Trindade, *Application*, *supra* note 40, p. 131.

[87] See, for example, *Steiner and Gross v. Polish State* (1927-28) 4 *Annual Digest of Public International Law Cases* (hereinafter *Annual Digest*), p. 472; *American International Group Inc. v. Iran*, Award No. 93-2-3 (1983) 4 *Iran-US CTR* p. 96.

writings[88] of jurists support such a conclusion. Special Rapporteur García Amador was equivocal on this subject: in his sixth and final report to the Commission in 1961 he contemplated only an express waiver of local remedies,[89] but later, in *The Changing Law of International Claims* (1984) he accepted that a waiver might be implied provided it was clear and unequivocal.[90]

55. No general rule can be laid down as to when an intention to waive local remedies may be implied. Each case must be determined in the light of the language of the instrument and the circumstances of its adoption.[91] It is, however, helpful to look at different types of arbitration agreements as special considerations may apply to different agreements.

General arbitration agreement entered into before dispute

56. Where the respondent State has agreed to submit disputes to arbitration that may arise in future with the applicant State, there is support for the view that such an agreement "does not involve the abandonment of the claim to exhaust all local remedies in cases in which one of the contracting parties espouses the claim of its national."[92] Indeed in several cases involving a general agreement of this kind the applicant State has declined to raise waiver implied from the fact of submission to arbitration as a counter-argument to a preliminary objection based on the non-exhaustion of local remedies.[93] That there is a strong presumption against implied or tacit waiver in such a case was confirmed by the Chamber of the International Court of Justice in the *ELSI* case.[94]

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[88] Law, *supra* note 24, p. 93; *Oppenheim's International Law*, *supra* note 53, pp. 525-526; Amerasinghe, Local Remedies Rule, *supra* note 36, pp. 735-736; Borchard, *Diplomatic Protection*, *supra* note 54, pp. 819, 825.

[89] In this report he adopted the view that the exhaustion of local remedies rule "shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary" (García Amador, Sixth report, *supra* note 28, p. 48, article 18 (4)). See further *Affaire relative à la concession des phares de l'Empire Ottoman* (Greece v. France) (1956) 12 *U.N.R.I.A.A.* p. 161 at pp. 186-187.

[90] At p. 467.

[91] In his first report García Amador stated that it was necessary to look at the *travaux préparatoires* of the agreement: "to determine whether the particular dispute is included among those covered by the arbitration agreement and, if so, whether that agreement meant, explicitly or implicitly, to waive the application of the local remedies rule in those disputes. In other words, the application of the local remedies rule will necessarily depend not only on the purpose and scope of the agreement, but also on the circumstances of each particular case." First report, *supra* note 12, p. 204, para. 164. See also Law, *supra* note 24, pp. 93, 98; Jiménez dé Aréchaga, General Course, *supra* note 86, p. 292; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 256-257; *Restatement (Second)*, *supra* note 16, vol. II, p. 620, para 209, cmt. (b). See also *Steiner and Gross v. Polish State*, *supra* note 87, p. 472.

[92] F. A. Mann, "State contracts and international arbitration" (1967), 42 *B.Y.I.L.* p. 1 at p. 32; A. V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 414; Verzijl, *supra* note 54, pp. 3-4; *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 526, n. 16; Jiménez de Aréchaga, General Course, *supra* note 86, p. 292; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 253, 257-258; Amerasinghe, "Whither the Local Remedies Rule?" *supra* note 54, pp. 295-296; Law, *supra* note 24, p. 98.

[93] See, for example, the *Interhandel* case, *supra* note 14, and the *ELSI* case, *supra* note 35. See further Amerasinghe, *Local Remedies*, *supra* note 40, p. 253; Amerasinghe, "Whither the Local Remedies Rule?", *supra* note 54, p. 295.

[94] *Supra* note 85.

57. In the *Panevezys-Saldutiskis Railway* case the Permanent Court of International Justice held that acceptance of the Optional Clause under Article 36, paragraph 2, of the Statute of the Court did not constitute implied waiver of the local remedies rule,[95] as argued by Judge van Eysinga in a dissenting opinion.[96] That the majority opinion is accepted is confirmed by the failure of the applicant State to raise waiver in response to a preliminary objection of non-exhaustion of local remedies in either the *Norwegian Loans* case[97] or the *Interhandel* case,[98] in which the jurisdiction of the Court was asserted on the basis of a declaration under the Optional Clause. As there is an analogy between submission to the jurisdiction of the International Court of Justice under the Optional Clause and a general arbitration agreement, it is possible to invoke this jurisprudence on the Optional Clause in support of a presumption against tacit waiver by means of a general arbitration agreement. Although such a presumption is strong, it is not irrebuttable.[99]

Ad hoc arbitration agreement entered into after dispute

58. A waiver of local remedies may be more easily implied from an arbitration agreement entered into after the dispute in question has arisen. In such a case it may be contended that such a waiver may be implied if the respondent State entered into an arbitration agreement with the applicant State covering disputes relating to the treatment of nationals *after* the injury to the national who is the subject of the dispute and the agreement is silent on the retention of the local remedies rule.[100] Support for this position is to be found in the decisions of claims commissions.[101] Some see confirmation of the possibility of waiver being implied from arbitration agreements entered into *after* the dispute has arisen in the fact that some such agreements expressly require the exhaustion of local remedies.[102] Neither the PCIJ

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[95] *Supra* note 14. Support for this position comes from Verzijl, *supra* note 54, p. 4; Schwarzenberger, *supra* note 20, p. 610; Jiménez de Aréchaga, General Course, *supra* note 86, p. 292; and Amerasinghe, *Local Remedies*, *supra* note 40, pp. 256-257.

[96] Judge van Eysinga stated: "It would seem that Lithuania cannot rely upon this rule [the local remedies rule] as against Estonia for the very reason that the acceptance by the two States of the Court's compulsory jurisdiction under Article 36 of the Court's Statute, which acceptance is unreserved ..., implies the setting aside of the rule in question in relation to the two States." *Panevezys-Saldutiskis Railway* case, *supra* note 14, pp. 35-36.

[97] *Supra* note 44.

[98] *Supra* note 14.

[99] See *Steiner and Gross v. Polish State*, *supra* note 87, p. 472. Here the Upper Silesian tribunal held that Poland had impliedly waived the local remedies rule in article 5 of the German-Polish Convention of 1922, which provided that "The question of knowing whether and to what extent an indemnity for the suppression or diminution of acquired rights should be paid by the State will be directly determined by the Arbitral Tribunal upon complaint by the rightful claimant." The Tribunal held that the expression "directly" was to be interpreted as conferring upon the claimants the right to have recourse to the international tribunal without first exhausting local remedies.

[100] Law, *supra* note 24, pp. 93-94; Borchard, Theoretical Aspects, *supra* note 77, p. 240; Borchard, *Diplomatic Protection*, *supra* note 54, pp. 819, 825; García Amador, *Changing Law*, *supra* note 77, p. 550.

[101] See the cases confirming this position in Borchard, Theoretical Aspects, *supra* note 77, p. 240; Borchard, *Diplomatic Protection*, *supra* note 54, p. 819; and Hackworth, *supra* note 34, vol. 5, p. 525. See also *American International Group, Inc. v. Iran*, *supra* note 87, p. 102; *Giorgio Uzielli* case, Italian-United States Conciliation Commission, (1963) 16 *U.N.R.I.A.A.* p. 267 at pp. 270-271. *Sed contra Salem* case, *supra* note 86, p. 1189.

[102] See, for instance, Borchard, *Diplomatic Protection*, *supra* note 54, p. 819. See also Judge van

nor the ICJ have addressed waiver in the case of agreements falling into this category.

Contract between alien and respondent State

59. A contract to arbitrate between an alien and the host State which expressly or impliedly waives local remedies is not directly relevant here, as dispute settlement in such a case does not involve the espousal of the alien's claim by the State of nationality. Such a contract may, however, become relevant for present purposes if the host refuses to arbitrate and the State of nationality intercedes to protect its national. The question will then arise whether the contractual stipulation, express or implied, to exclude domestic remedies is to prevail. While there is support for the view that an express waiver[103] is to be given effect to, it is less clear whether a contract between a State and an alien agreeing to settle disputes by arbitration, without explicit mention of recourse to local remedies as a precondition to arbitration, is to be interpreted as implying a waiver of local remedies. There is strong support among writers for the view that such an agreement is intended to exclude local remedies.[104] Some arbitral tribunal decisions expressly favour this approach,[105] while in many cases of this kind no objection based on non-exhaustion of local remedies has been raised by the respondent State.[106] While an argument for implied waiver in such cases has been raised before the PCIJ and the ICJ,[107] neither Court has pronounced on the matter.

Eysinga's dissenting opinion in the *Panevezys-Saldutiskis Railway* case, *supra* note 14, pp. 37-38.

[103] Law, *supra* note 24, p. 94; Herdegen, *supra* note 46, p. 69; García Amador, Third report, *supra* note 77, p. 55. Article 17 of García Amador's draft states that the rule of the exhaustion of local remedies (article 15) "shall not apply if the State has expressly agreed with the alien, or, as the case may be, with the State of his nationality, to dispense with local remedies."

[104] Mann, *supra* note 92, p. 32; *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 523, n. 3; García Amador, Sixth report, *supra* note 28, p. 48, article 18(5); García Amador, *Changing Law*, *supra* note 77, pp. 539-550; S. M. Schwebel, *International Arbitration: Three Salient Problems* (1987), pp. 117-121; S. M. Schwebel and J. G. Wetter, "Arbitration and the Exhaustion of Local Remedies" (1966), 60 *A.J.I.L.* p. 484 at p. 499; Report of the Executive Directors of the Bank on the International Convention for the Settlement of Investment Disputes, quoted in Whiteman, *supra* note 60, vol. 9, p. 806; *Restatement (Third)*, *supra* note 16, vol. II, p. 226, para. 713, Reporter's Note 5. See also *Restatement (Second)*, *supra* note 16, vol. II, p. 621, para. 209, cmt. (c); O'Connell, *supra* note 20, p. 1059. *Sed contra* A. O. Adede, "A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies" (1977), 18 *Harvard International Law Journal* p. 1 at p. 8, who claims that statements made by States upon ratifying the General Treaty of Inter-American Arbitration, which does not explicitly require the exhaustion of local remedies, indicate their conviction that the rule is nevertheless not waived.

[105] *LIAMCO v. Libya* (1977) 62 *I.L.R.* p. 141 at pp. 179-180; *Elf Aquitaine Iran v. National Iranian Oil Company*, (1982) 96 *I.L.R.* p. 252 at pp. 278-279, para. 44.

[106] Amerasinghe, *Local Remedies*, *supra* note 40, p. 262.

[107] See Swiss Memorial in *Affaire Losinger and Co.* (1936) *P.C.I.J. Series C*, No. 78, p. 40; United Kingdom contentions in *Anglo-Iranian Oil Co.*, *supra* note 84, pp. 81-82; French arguments in *Electricité de Beyrouth Co. Case* 1954 *I.C.J. Pleadings* p. 14; French submissions in *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient Case*, 1960 *I.C.J. Pleadings* pp. 39, 91-93. *Sed contra* Yugoslav pleadings in *Affaire Losinger and Co.* (1936) *P.C.I.J. Series C*, No. 78, p. 132; Iran's submission in *Anglo-Iranian Oil Co.*, 1951 *I.C.J. Pleadings* p. 288; Lebanese arguments in *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and the Société Radio-Orient Case*, 1960 *I.C.J. Pleadings* pp. 67-70.

Estoppel

60. The conduct of the respondent State during international proceedings may result in that State being estopped from requiring that local remedies be exhausted.[108] This was acknowledged by a Chamber of the International Court of Justice in the *ELSI* case when it stated that:

> "it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said".[109]

Support for this principle is also to be found in the *Heathrow Airport User Charges Arbitration*.[110]

61. In the *Aerial Incident* (United States v. Bulgaria) the United States submitted that:

> "If there were any local remedies available in Bulgaria to the next of kin of Americans killed in the shooting down of the El Al Airlines Constellation on July 27, 1955, the Bulgarian Government never averted to them, nor to the desirability or necessity of their being exhausted when the United States presented its diplomatic claim to the Government of Bulgaria in 1955 and 1957. Instead, the Bulgarian Government entertained the diplomatic claim and undertook to discharge it ... In view of these facts, Bulgaria is not entitled not to raise, for the first time, the assertion of the requirement that local remedies be exhausted."[111]

The International Court of Justice did not, however, have the opportunity to pronounce on this matter.

62. Both the European Court of Human Rights[112] and the Inter-American Court of Human Rights[113] have indicated that a respondent State may be estopped from

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[108] Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 626; *Oppenheim's International Law*, *supra* note 53, vol. 1, pp. 525-526; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 268-270, 272-275.

[109] *Supra* note 35, p. 44, para. 54.

[110] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* (Arbitration Tribunal), (1996) 102 *I.L.R.* p. 216 at p. 285, para. 6.33.

[111] 1959 *I.C.J. Pleadings*, p. 326.

[112] In *Foti and Others*, the Court stated: "The Court will take cognizance of preliminary objections of this kind [concerning the non-exhaustion of local remedies] in so far as the respondent State may have first raised them before the Commission, in principle at the stage of the initial examination of admissibility, to the extent that their character and the circumstances permitted; *if this condition is not fulfilled, the Government are estopped from raising the objection before the Court"* (1982) 71 *I.L.R.* p. 366 at p. 380, para. 46. Emphasis added. See further *Artico* (1980), 60 *I.L.R.* p. 182 at pp. 192-194, paras. 24-27; *Guzzargi* (1980) 61 *I.L.R.* p. 276 at pp. 301-302, para. 67; *Corigliano* (1982) 71 *I.L.R.* p. 395 at p. 403.

[113] In *Castillo Petruzzi v. Peru*, the Court stated:

> "The court also indicates that the State did not allege the failure to exhaust domestic remedies before the Commission. By not doing so, it waived its means of defense that the Convention established in its favor and made a tacit admission of the non-existence of such remedies or their timely exhaustion, as has been stated in proceedings before organs of international jurisdiction (such as the European Court, which has maintained that objections to inadmissibility should be raised at the initial stage of the proceedings before the Commission, unless it proves impossible to interpose them at the appropriate time for reasons that cannot be attributed to the Government"). (1999) 20 *Human Rights Law Journal*, p. 176 at pp. 181, para. 56.

raising an objection based on non-exhaustion of local remedies when it has failed to raise this objection at the appropriate time.

63. The exhaustion of local remedies rule is a rule of customary international law. A respondent State should not therefore be estopped from asserting this rule unless its conduct has clearly led the applicant State to act in a manner detrimental to its interests. This was made clear by a Chamber of the International Court of Justice in the *ELSI* case when it stated:

> "there are obvious difficulties in construing estoppel from the mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges."[114]

The Court likewise adopted a cautionary approach in the *Interhandel* case, in which it stated that it did not

> "consider it necessary to dwell upon the assertion of the Swiss Government that 'the United States itself has admitted that Interhandel had exhausted the remedies available in the United States courts'. It is true that the representatives of the Government of the United States expressed this opinion on several occasions, in particular in the memorandum annexed to the Note of the Secretary of State ... This opinion was based upon a view which has proved unfounded. In fact, the proceedings which Interhandel had instituted before the courts of the United States were in progress."[115]

Amerasinghe states the position accurately in declaring:

> "There must be cogent evidence that the conduct was not only intended to lead the alien or individual to believe that local remedies need not be further exhausted, for whatever reason, but also that the latter could reasonably be expected to rely on that conduct, did rely on it and for that reason did not resort to the local remedies which were available."[116]

Conclusion

64. While there is support both for implied waiver of local remedies and for estoppel as a rebuttal of an objection based on non-exhaustion of local remedies, it is clear that neither of these obstacles in the way of the application of a customary rule is to be easily accepted. Despite this, it is necessary to acknowledge their possible existence, depending on the language of the relevant instruments and the circumstances and context of the particular case. Hence the proposed exception to the local remedies rule.

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[114] *Supra* note 35, p. 44, para. 54.

[115] *Supra* note 14, p. 27. See also the dissenting opinion of Judge Córdova at pp. 46-47. Cf. the dissenting opinion of Judge Erich in the *Panevezys-Saldutiskis* case:

> "It may happen that the State to which a claim is presented may be quite prepared to discuss its merits or even prepared to submit the claim to an international tribunal, although no final decision has been rendered by the competent judicial or administrative authority of the country. If in a particular case it appears from the attitude of the Government that it waives this condition and that it is, so to speak, prepared to transfer the claim directly to the international plane, it cannot subsequently retreat from that position" (*supra* note 14, p. 52).

[116] *Local Remedies*, *supra* note 40, p. 273.

3. Voluntary link and territorial connection (article 14 (c) and (d))

Article 14
Local remedies do not need to be exhausted where:

...

(c) there is no voluntary link between the injured individual and the respondent State;

(d) the internationally wrongful act upon which the international claim is based was not committed within the territorial jurisdiction of the respondent State;

65. The exceptions to the rule that local remedies must be exhausted contained in subparagraphs (c) and (d) will be considered together as they are closely related. Although there is support for these rules, the Special Rapporteur doubts whether they are justified, on the ground that other exceptions to the local remedies rule, or general principles of international law, will normally ensure that the local remedies rule is excluded in the circumstances covered in subparagraphs (c) and (d). For this and other reasons the International Law Commission declined to adopt such a rule in 1977 when it considered article 22 in the draft articles on State responsibility (first reading).[117] The issue does, however, require careful consideration and for this reason the exceptions in subparagraphs (c) and (d) are presented as possible rules in the event that the Commission elects to adopt provisions on this subject. The arguments for and against these rules are presented in order to provide the Commission with a full picture.

66. It is argued by some writers that the exhaustion of local remedies rule does not apply where the injured alien has no voluntary link with the respondent State because there is no territorial connection between the individual and the respondent State.[118]

67. In support of this view, it is argued that in all the cases in which the exhaustion of local remedies has been required there has been some link between the injured individual and the respondent State, such as voluntary physical presence, residence, ownership of property or a contractual relationship with the respondent State. Thus Meron has stated:

> "While it is possible to find the broadest formulations of the rule of local remedies, an examination of the precedents reveals the following common basis of facts: In all of them the injured alien has voluntarily established, or may be deemed to have established, either expressly or impliedly, a link with

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[117] *Yearbook .... 1977*, vol. II (Part Two), pp. 43-45, paras. 38-42.

[118] See O'Connell, *supra* note 20, vol. II, p. 951; T. Meron, "The Incidence of the Rule of Exhaustion of Local Remedies", (1959) 35 *B.Y.I.L.* p. 83; C. Parry, "Some Considerations upon the Protection of Individuals in International Law" (1956-II), 90 *Recueil des Cours* p. 190 at p. 688; Amerasinghe, *Local Remedies*, *supra* note 40, p. 138; Doehring, *supra* note 59, 239; Ipsen, *supra* note 77, p. 312; Herdegen, *supra* note 46, p. 66; Mummery, *supra* note 37, p. 394; I. L. Head, "A Fresh Look at the Local Remedies Rule", (1967) 5 *Canadian Yearbook of International Law* p. 143 at pp. 153; Jiménez de Aréchaga, "International Responsibility" *supra* note 54, p. 583. *Sed contra*, see W. K. Geck, "Diplomatic Protection", in *E.P.I.L.* (1992) vol. 1, p. 1045 at p. 1056; G. Gaja, *L'Esaurimento dei picorsi interni nel diritto internazionale* (1967), p. 87.

> the State whose actions are impugned. Such a link could be established in a variety of ways which it is not necessary to enumerate here exhaustively. It will suffice to refer to the more common examples. These include cases in which an alien resides, either permanently or temporarily, in the territory of the respondent State, engages there in business, owns there property or enters into contractual relations with the Government of that State. It appears that in all the reported cases which are relevant to the rule of local remedies and in which it was considered necessary that the allegedly wrongdoing State should in the first place be given an opportunity to redress the alleged wrong by means furnished by its own courts, a link of this character did in fact exist."[119]

68. Proponents of this view maintain that the nature of diplomatic protection and the local remedies rule has undergone major changes in recent times. Whereas the early history of diplomatic protection was characterized by situations in which a foreign national resident and doing business in a foreign State was injured by the action of that State and could therefore be expected to exhaust local remedies in accordance with the philosophy that "the national going abroad should normally be deemed to take the local law as he finds it, including the means afforded for the redress of wrong",[120] an individual may today be injured by the act of a foreign State outside its territory or by some act within its territory in circumstances in which the individual has no connection with the territory. Examples of this are afforded by transboundary environmental harm (for example, the explosion at the Chernobyl nuclear plant near Kiev in the Soviet Union, which caused radioactive fallout as far away as Japan and Scandinavia) and the shooting down of aircraft that have accidentally strayed into a State's airspace (as illustrated by the *Aerial Incident* in which Bulgaria shot down an El Al flight that had accidentally entered its airspace). According to Meron:

> "This broadening of the law of State responsibility is an important reason for the re-examination of both the basis and the scope of the rule of local remedies. Surely it would be unreasonable to refer individuals injured by a foreign State outside its territory to its courts as a condition precedent to the institution of international proceedings by the State of which the victim was a national; and this, despite the absence of a genuine link between the injured individual and the respondent State."[121]

69. Those who support the adoption of a voluntary link/territorial connection rule emphasize the assumption of risk undertaken by the alien in a foreign State as the basis for the local remedies rule.[122] It is only where the alien has subjected himself voluntarily to the jurisdiction of the respondent State that he can be expected to exhaust local remedies.

70. There is no clear authority either for or against the requirement of a voluntary link.

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[119] *Supra* note 118, p. 94.

[120] Borchard, Theoretical Aspects, *supra* note 77, p. 240. See also Borchard, *Diplomatic Protection*, *supra* note 54, p. 817; and C. Eagleton, *The Responsibility of States in International Law* (1928), p. 96.

[121] *Supra* note 118, p. 98.

[122] Brownlie, *supra* note 45, p. 501. Brownlie does, however, indicate that there is an opposing philosophy: "If the major objective is to provide an alternative, relatively more convenient recourse to that of proceedings on the international plane, then no condition as to link will apply" (loc. cit.).

Judicial decisions

71. Judicial decisions afford little guidance on the subject.

72. In the *Interhandel* case the International Court of Justice stated:

> "it has been considered necessary that the *State where the violation occurred* should also have an opportunity to redress it by its own means."[123]

This dictum which *permits* the territorial State to require local remedies to be exhausted seems to be too small a peg on which to hang a doctrine, as C. F. Amerasinghe has sought to do in arguing that it lends support to the view that the wrong must be located in the territory of the delinquent State, from which it would follow "that the person or property must also be located in the delinquent State".[124] In the *Salem* case, an arbitral tribunal declared that "as a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence".[125] Again, this trite reformulation of the local remedies rule hardly provides evidence of a rule requiring a voluntary link as a precondition for the local remedies rule.

73. The issue was raised in the *Norwegian Loans* case,[126] in which France, in arguing that French nationals who held Norwegian bonds but were resident in France were not obliged to exhaust local remedies in Norway, stated:

> "the only explanation of this rule lies in the requirement that a foreigner in dispute with the State *under whose sovereignty he has chosen to live* may not have his case transferred to the international level without having first exhausted all local means of settlement".[127]

In reply, Norway argued that practice did not support the French thesis, relying on the arbitral awards in the *Finnish Ships*[128] and *Ambatielos*[129] cases, in which the rule of local remedies was held to be applicable despite the fact that the individual claimants did not reside in the respondent State. The Court did not find it necessary to go into the question of the exhaustion of local remedies, since the case was decided on other grounds. The only reference to the argument of the parties regarding this issue was made by Judge Read in a dissenting opinion when he stated that "France has not been able to put forward any persuasive authority ... and, indeed, the weight of authority is the other way".[130]

74. The requirement of a voluntary link featured prominently in the Israeli argument in the *Aerial Incident* case, in which Israel made a claim for damages from Bulgaria arising from the shooting down of an Israeli civil aircraft that had entered Bulgarian airspace by mistake. Here Shabtai Rosenne, for Israel, argued.

> "it is essential, before the rule [of local remedies] can be applied, that a link should exist between the injured individual and the State whose actions are

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[123] *Supra* note 14, p. 27. Emphasis added.
[124] *Supra* note 40, p. 145.
[125] *Supra* note 86, p. 1202.
[126] *Supra* note 44.
[127] *Norwegian Loans* case, 1957 *I.C.J. Pleadings*, vol. 1, p. 408 (quoted in R. Ago, Sixth report, *supra* note 75, p. 38, para. 98). Emphasis added.
[128] *Supra* note 13.
[129] *Supra* note 14.
[130] *Supra* note 44, p. 97.

> impugned. I submit that all the precedents show that the rule is only applied when the alien, the injured individual, has created, or is deemed to have created, *a voluntary, conscious and deliberate connection* between himself and the foreign State whose actions are impugned. The precedents relate always to cases in which a link of this character has been brought about, for instance, by reason of residence in that State, trade activities there, the ownership of property there — I believe that that covers the majority of the cases — or by virtue of his having made some contract with the Government of that State, such as the cases involving foreign bondholders; and there may be other instances".[131]

Bulgaria contested the Israeli argument.[132] Again, the Court did not decide on the matter.[133]

75. In the *Trail Smelter* case,[134] involving transboundary pollution in which there was no voluntary link or territorial connection, there was no insistence by Canada on the exhaustion of local remedies. This case and others[135] in which local remedies were dispensed with where there was no voluntary link have been interpreted as lending support to the requirements of voluntary submission to jurisdiction as a precondition for the application of the local remedies rule.[136] The failure to insist on the application of the local remedies rule in these cases can, however, be explained on other grounds. The *Trail Smelter* case may, for instance, be explained as an example of direct injury, in which local remedies do not need to be exhausted, or on the basis that the arbitration agreement in question did not require local remedies to be exhausted.

76. Opponents of the voluntary link/territorial connection requirement argue that tribunals have accepted the need for the exhaustion of local remedies in cases such as the *Finnish Ships*,[137] *Ambatielos*[138] and *Elettronica Sicula (ELSI)*,[139] where there was no close connection between the injured national and the respondent State. This is a misleading argument, as in all three cases there was some connection with the respondent State, either in the form of a contractual relationship (*Ambatielos* and *ELSI*) or physical presence (*Finnish Ships*). Proponents of the voluntary link requirement do not equate such a link with *residence* and have therefore conceded that in the above cases there was sufficient connection between the injured national and the respondent State to make the local remedies rule applicable.[140] If residence were to be a requirement, this would exclude the application of the local remedies rule in cases involving the expropriation of foreign-owned property and contractual transactions where the alien is a non-resident. Today no serious writer supports such a position.

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[131] Oral Pleadings of Israel in the *Aerial Incident* case (Israel v. Bulgaria), *supra* note 111, pp. 531-532. Emphasis added. See also ibid., p. 590.

[132] Ibid. at p. 565.

[133] 1959 *I.C.J. Reports* p. 127.

[134] (1935) 3 *U.N.R.I.A.A.* p. 1905.

[135] *Virginius* case, reported in J. B. Moore, *A Digest of International Law* (1906), vol. II, p. 895 at p. 903; *Jessie* case, reported in (1922) 16 *A.J.I.L.* pp. 114-116.

[136] Law, *supra* note 24, p. 104; Meron, *supra* note 118, p. 98, fn. 2.

[137] *Supra* note 13.

[138] *Supra* note 14.

[139] *Supra* note 35, p. 42, para 50.

[140] See Meron, *supra* note 118, pp. 99-100; and Amerasinghe, *supra* note 40, p. 144.

State practice

77. State practice is likewise unclear. In early British practice it was asserted that where an alien suffered injury on the high seas, as a result of the seizure or capture of a vessel, it was necessary for local remedies to be exhausted in the seizing or capturing State.[141] C. F. Amerasinghe rightly doubts whether this practice would be recognized today.[142] Certainly, there is no mention of this practice, or indeed of any requirement for a voluntary link in the most recent British practice rules.[143]

78. United States practice was initially very different. In 1834, Secretary of State McLane stated that local remedies had to be exhausted by United States citizens in the State

> "in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide."[144]

Whether this remains the position of the United States is unclear. The *Third Restatement of the Foreign Relations Law* of the United States is silent on the need for a voluntary link as a precondition for the local remedies rule.[145]

79. Recent State practice suggests that a State responsible for accidentally shooting down a foreign aircraft will not require the exhaustion of local remedies as a precondition for claims brought against it by the families of victims. China did not require local remedies to be exhausted before paying compensation to those who had suffered when it shot down a British Cathay Airliner in 1960.[146] Nor did the United States when it offered ex gratia payments to nationals of Iran following the shooting down by United States missiles of an Iranian passenger aircraft over Iran.[147] Most recently, India did not raise the non-exhaustion of local remedies as a preliminary objection to a claim by Pakistan for damages resulting from the destruction by India of a Pakistani aircraft.[148]

80. The same practice seems to apply in the case of transboundary environmental damage. Thus Canada waived the requirement of exhaustion of local remedies when it agreed to compensate United States citizens who had suffered loss as a result of the construction of the Gut Dam.[149] Article XI of the 1972 Convention on

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[141] McNair, 2 *International Law Opinions* (1956) p. 302.

[142] *Supra* note 40, p. 143.

[143] See Warbrick, *supra* note 16.

[144] Moore, *Digest*, *supra* note 135, vol. 6, pp. 658.

[145] *Restatement (Third)*, *supra* note 16, part II, p. 348, para. 902 cmt. (k); p. 219, para. 713, cmt. (f); pp. 225-226, para. 713, Reporter's Note 5.

[146] This incident is described in Law, *supra* note 24, p. 104.

[147] See *Aerial Incident of 3 July 1988* (Iran v. United States of America), *I.C.J. Pleadings*, Preliminary Objections submitted by the United States of America, Part I, chap. III, sect. I, pp. 44-48.

[148] *Aerial Incident of 10 August 1999* (*Pakistan v. India*), *Jurisdiction of the Court*, (2000) 39 *I.L.M.* p. 1116.

[149] See the United States-Canada Lake Ontario (Gut Dam) Arbitration Agreement, *supra* note 82, and the Report of the Agent of the United States Before the Lake Ontario Claims Tribunal, reproduced in (1969) 8 *I.L.M.* p. 118. The attitude of Canada may also be explained by the fact that the Canadian courts declared that they did not have jurisdiction over the relevant cases. (United States-Canada Lake Ontario (Gut Dam) Arbitration Agreement, p. 475).

International Liability for Damage caused by Space Objects provides further support for this view:

> "1. Presentation of a claim to a launching State for compensation for damage under this Convention shall not require the prior exhaustion of local remedies which may be available to a claimant State or to natural or juridical persons it represents.
>
> "2. Nothing in this Convention shall prevent a State, or natural or juridical persons it might represent, from pursuing a claim in the courts or administrative tribunals or agencies of a launching State. A State shall not, however, be entitled to present a claim under this Convention in respect of the same damage for which a claim is being pursued in the courts or administrative tribunals or agencies of a launching State or under another international agreement which is binding on the States concerned."[150]

Writers have convincingly argued that the extension of the law of State responsibility to transboundary environmental harm requires a reconsideration of the applicability of the local remedies rule.[151]

Codification proposals

81. Early codification proposals were concerned with expounding the principles of State responsibility for damage done "in its territory to the person or property of foreigners".[152] Hence no attention was paid to the question of responsibility where the alien was outside the territory of the respondent State. The 1960 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens not only does not include the territorial voluntary link requirement in the relevant article (article 19), but in its commentary explicitly states that the Draft Convention

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[150] (1975) *U.N.T.S.* No. 961, 187 at pp. 191-192, (1971) 10 *I.L.M.* p. 965. This Convention was invoked by Canada in 1979 when a Soviet satellite powered by a small nuclear reactor broke up over Canada and crashed in its North-West Territories. The Soviet Union agreed to pay compensation of Can$ 3 million to Canada: (1979) 18 *I.L.M.* p. 899; (1981) 20 *I.L.M.* p. 689. In this case Canada made a direct claim as there was no injury to Canadian nationals or to private property.

[151] According to K. B. Hoffman: "While not yet recognized as a principle of international law, the 'link theory' appears to be gaining currency and would seem an important development in the law of State responsibility as the application of the law broadens to include environmental matters": "State Responsibility in International Law and Transboundary Pollution Injuries" (1976), 25 *I.C.L.Q.* p. 509 at p. 540. See also R. J. M. Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (1996), pp. 123, 154; P. N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2000), p. 219; Jiménez de Aréchaga, General Course, *supra* note 86, p. 296; O. Schachter, "International Law in Theory and Practice", (1982-V) 178 *Recueil des Cours* p. 9 at p. 203. See further J. Barboza, Sixth report on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook ... 1990*, vol. II (Part One), p. 83 at p. 109 (Article 28), document A/CN.4/428 and Add.1. See also the report of the ILC Working Group on this issue in *Yearbook ... 1978*, vol. II (Part Two), p. 150 at p. 151, para. 15.

[152] See the Draft Convention prepared by the Preparatory Commission for the 1930 Hague Codification Conference entitled "Responsibility of the State for Damage done in Its Territory to the Person or Property of Foreigners"; the 1929 Harvard Draft Convention with the same title; F.V. García Amador, Second report on the responsibility of the State for injuries caused in its territory to the person and property of aliens, *Yearbook ... 1957*, vol. II, p. 104, document A/CN.4/106.

> "had not adopted the view that the exhaustion of local remedies should be dispensed with when the requirement would cause hardship to the claimant ... Recourse to local remedies may be burdensome when the injured alien has no real connection with the State which is responsible for the injury, as in the case in which the alien is merely passing through the territory of the State concerned. If he is to make effective use of local remedies, he may have to travel a great distance from his place of residence to the State in which the injury took place. *Although such an exception to the usual rule might be desirable, it finds no support in the decided cases*".[153]

82. The International Law Commission considered this issue when it adopted article 22 of the draft articles on State responsibility on first reading.[154] In so doing it rejected a proposal that the local remedies rule should be excluded in the absence of a territorial connection or voluntary link[155] and decided that as neither State practice nor judicial decisions provided

> "any explicit statements of position concerning the applicability or non-applicability of the condition of the exhaustion of local remedies to cases in which injury to foreign individuals or to their property has been caused *outside the territory of the State*",[156]

It was best therefore

> "to leave the problem of the applicability of the principle of the exhaustion of local remedies to cases of injury caused by a State to aliens outside its territory, and to similar cases, to be solved by State practice according to the best criteria available."[157]

Conclusion

83. Judicial decisions and State practice have not yet adequately addressed the question of the applicability of the local remedies rule in the absence of a voluntary link or territorial connection. There is clearly substance in the arguments raised by the advocates of such an exception to the local remedies rule. It is unreasonable, impractical and unfair that an injured alien should be required to exhaust local remedies in hardship cases of the following kind:

(a) Transboundary environment law harm caused by pollution, radioactive fallout or man-made space objects;

(b) The shooting down of aircraft outside the territory of the respondent State or of aircraft that have accidentally entered its airspace;

(c) The killing of a national of State A by a soldier of State B stationed on the territory of State A;

(d) The transboundary abduction of a foreign national from either his home State or a third state by agents of the respondent State.

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[153] Sohn and Baxter's commentary cited in Whiteman, *supra* note 60, vol. I, p. 794.
[154] *Yearbook ... 1977*, vol. II (Part Two), pp. 43-45, paras. 38-42.
[155] Ibid., para. 40.
[156] Ibid., para. 38.
[157] Ibid., para. 40.

The question that must be addressed is whether instances of this kind require a special rule exempting them from the reach of the local remedies rule or whether such cases are covered by existing rules or general principles of international law.

84. Before addressing this question it must be emphasized that in many of these cases there will be a direct injury to the national State of the injured individual in addition to the injury to the individual. If the preponderance rule proposed in draft article 11 is followed, the exhaustion of local remedies will be inapplicable in many such cases. Transboundary environmental harm will in most cases be characterized as direct injury, as illustrated by the *Trail Smelter* case[158] So too will the shooting down of a foreign aircraft; as was persuasively argued by Israel in the *Aerial Incident* between Israel and Bulgaria.[159] Abductions too constitute a direct injury to the State in which the abduction originated whose territorial sovereignty has been violated.

85. Where the claimant State prefers not to bring a direct claim or where the injury to the national outweighs the injury to the State it seems that in most instances the local remedies rule will not apply because there will be no available or effective remedy in the respondent State or any such remedy would be futile. It was largely for this reason that the International Law Commission declined to adopt a special rule on the voluntary link.[160] A similar view is advanced by Juliane Kokott in her report of 2000 to the Committee on Diplomatic Protection of Persons and Property of the International Law Association.[161]

86. The suggestion that the requirement of an effective remedy may overcome hardship or injustice in such a case was repudiated by Jiménez de Aréchaga:

> "It is possible, however, that a person hurt in his own territory by a soldier from another State or by a space object may find effective remedies in the other State: yet it would be unequitable and impose an undue hardship to require him to attempt those remedies in the foreign State. This shows that the effectiveness of a remedy is not a sufficient reason to make it obligatory or to dispense with it. The preferable solution in those cases may be to make the use

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158 *Supra* note 134.

159 Israel's argument is clearly expounded by Meron, *supra* note 118, pp. 92-94.

160 *Yearbook ... 1977*, vol. II (Part Two), p. 5 at p. 44, para 39. In his Sixth report on State responsibility (*supra* note 75, p. 39, para. 100), Roberto Ago elaborated on this theme:

> "it would seem to us more consistent with the reason for the existence of the principle of exhaustion of local remedies, and with the logic of that principle, to provide, in a form to be worked out, that the collaboration of individuals should not always be required in order to set in motion machinery enabling the State to redress, by a new course of conduct, a situation which is contrary to the result internationally required of it and which has been brought about by its original conduct. Such a provision would apply, for example, in the case of injury caused to a foreigner brought into the territory of a State, or conveyed in transit by air or over land, against his will. *It might be found in fact that the burdens that would otherwise devolve upon such an individual would be too heavy to be justified.* However, even without expressly providing for an exception which might compromise the soundness of the principles, would it not be possible to regard these few extreme cases as covered by the general requirement that local remedies should be *effective*, that requirement being understood to include the further requirement that such remedies should also be effectively usable, in the cases submitted, by the individuals concerned?"

(first emphasis added; second in original)

161 Exhaustion of Local Remedies, *supra* note 31, pp. 614-615. See also Geck *supra* note 118.

of local remedies optional instead of obligatory, at the choice of the injured person."[162]

87. A general principle of law that would make the local remedies rule inapplicable in such cases is that of *ex injuria jus non oritur*. As Meron observes:

> "[A]ccording to general principles of law, it would be very strange indeed if a State which interfered illegally with an alien, who did not — except for that interference — have any connection with it, should be allowed to derive any advantage from its illegal acts."[163]

88. Jurisdictional rules may also preclude the application of local remedies rule in the hardship cases mentioned above. Although a State has wide extraterritorial jurisdiction there are circumstances in which the exercise of jurisdiction, will constitute an abuse or excess of jurisdiction rendering the rule inapplicable. This is emphasized by D. P. O'Connell:

> "The point is better put by emphasizing that the issue for trial when the injury occurs extraterritorially is whether or not the State is guilty of excess jurisdiction, and this is a question of international law best left to an international tribunal, whereas the issue for trial when the injury occurs intraterritorially is the nature of the injury done and whether any wrong has in fact been occasioned which international law required municipal law to remedy. In other words, in the case of extraterritorial injury the question before an international tribunal is whether the State, *by its actions,* has breached international law, but in the case of intraterritorial injury it is whether the State has done so *by its failure to remedy* the injury. The difference between the two cases is that in the one the event has occurred outside the jurisdiction of the municipal courts, which are thus incompetent to compel evidence and proceed to adjudication."[164]

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[162] General Course, *supra* note 86, p. 296. See also Schachter, *supra* note 151, p. 203; Law, *supra* note 24, p. 104; and Lefeber, *supra* note 151, pp. 123, 154. This approach was supported, among others, by the International Law Commission's Working Group on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law in 1978 in the following terms:

> "It may be noted that obligations of the kind now being considered are different from those that a State owes in respect of aliens who have chosen to place themselves or their property within that State's territory. In the situations that fall within the topic, there is no presumption of willingness to accept risks or harmful consequences because they are tolerated within the territory or control of the State in which those risks or harmful consequences arise. There is also no requirement to seek an effective remedy offered by municipal law — unless, indeed, there is an applicable regime, accepted by the States concerned, that does impose such a requirement" (*supra* note 151, p. 151, para. 15). See also UN/ECE Guidelines on Responsibility and Liability regarding Transboundary Water Pollution, United Nations document E/ENVWA/R.45, para. 22.

[163] *Supra* note 118, p. 96. To the same effect, see Jiménez de Aréchaga, General Course, *supra* note 86, p. 296; Head, *supra* note 118, p. 153; and Amerasinghe, *supra* note 40, p. 146.

[164] O'Connell, *supra* note 20, vol. II, p. 951. Emphasis in original. See also Herdegen, *supra* note 46, pp. 66-67; *Interhandel* case, *supra* note 14, p. 27; Amerasinghe, *supra* note 40, pp. 144-145. *Sed contra* R. Y. Jennings, "General Course on Principles of International Law" (1967-II), 121 *Recueil des Cours* p. 325 at p. 485.

89. It is clearly necessary that special consideration should be given to the applicability of the local remedies rules in cases where there is no voluntary link or territorial connection between the injured alien and the respondent State. Whether there is a need for a special exception in the present draft articles is uncertain. The existing exceptions to the local remedies rule *may* cover most of the "hardship cases" described in paragraph 75, but the Commission may decide that stronger and more explicit protection is needed. The Special Rapporteur's tentative conclusion is that such a provision is unnecessary, but he would certainly not oppose such a provision if the Commission so decided.

4. Undue delay (article 14 (c))

Article 14
Local remedies do not need to be exhausted where:

...

(e) the respondent State is responsible for undue delay in providing a local remedy;

90. That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in providing a local remedy is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion.

Codification

91. The Basis of Discussion proposed by the 1930 Preparatory Commission for the Codification Conference contained a rule in Basis of Discussion 27 on the exhaustion of local remedies. According to that proposal, the local remedies rule could not preclude the application of Basis of Discussion No. 5, which provided, inter alia, that:

> "A State is responsible for damage suffered by a foreigner as the result of the fact that:
>
> "...
>
> "3. There has been *unconscionable delay* on the part of the courts."[165]

92. A similar provision was proposed by the Third Committee of the 1930 Hague Codification Conference. This rule excused compliance with the exhaustion of local remedies rule in cases of denial of justice, and cited "unjustifiable ... delays implying a refusal to do justice" as an example.[166] The final text of the convention adopted at the Conference established the responsibility of a State, without the requirement of exhausting local remedies, for denial of justice, including "unwarranted delay".[167]

93. In 1933, the Seventh International Conference of American States, held in Montevideo, considered "unreasonable delay" as an exception to the local remedies

[165] Reproduced in García Amador, First report, *supra* note 12, p. 223. Emphasis added.
[166] Ibid. at p. 225. See article 9 (2).
[167] Article 9. To be compared to articles 7, 8 and 10 to 12, all of which require the exhaustion of local remedies, as a precondition to the establishment of State responsibility.

rule, but stated that this should be "interpreted restrictively, that is, in favour of the sovereignty of the State in which the difference may have arisen".[168]

94. The 1960 Draft Convention on the International Responsibility of States for Injuries to Aliens prepared by the Harvard Research on International Law contained the following proposal:

> "Local remedies shall be considered as not available for the purposes of this Convention:
>
> "...
>
> "(c) If only excessively slow remedies are available or justice is unreasonably delayed."[169]

95. García Amador did not include undue delay as an exception to the local remedies rule, even in the context of denial of justice.[170] Roberto Ago acknowledged that undue delay might lead to the conclusion that local remedies were ineffective,[171] but failed to propose this as a special exception in the local remedies rule in article 22. In her report on the "Exhaustion of Local Remedies" to the International Law Association Committee on Diplomatic Protection of Persons and Property, Juliane Kokott likewise considers "unreasonably prolonged proceedings" as an exception to the local remedies rule but does not suggest a separate provision on this exception in her proposed draft articles.[172]

Human rights instruments and practice

96. Several human rights conventions expressly exclude the need for the exhaustion of local remedies where their application has been "unreasonably prolonged".[173] The jurisprudence of the monitoring bodies of these conventions endorse this exception.[174]

Judicial decisions

97. Judicial decisions give some support to "undue delay" as an exception to the local remedies rule. In *El Oro Mining and Railway Co.*, the British-Mexican Claims Commission held that "nine years by far exceeds the limit of the most liberal allowance that may be made". It therefore considered the remedies to be ineffective and their exhaustion excused.[175] The International Court of Justice did not, however, consider 10 years of litigation sufficient to dispense with the need to

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[168] Reproduced in García Amador, First report, *supra* note 12, p. 226.

[169] Article 19 (2). Reproduced in Sohn and Baxter, *supra* note 66, p. 577.

[170] See García Amador, Sixth report, *supra* note 28, pp. 46-47, p. 48, articles 3 and 18 (2).

[171] *Yearbook ... 1977*, vol. II (Part Two), p. 48, para. 50, fn. 204.

[172] Exhaustion of Local Remedies, *supra* note 31, pp. 623-624.

[173] International Covenant on Civil and Political Rights (article 41 (1)(c)); American Convention on Human Rights (article 46 (2)(c)).

[174] *Weinberger v. Uruguay*, Communication 28/1978, Human Rights Committee, *Selected Decisions*, vol. 1, p. 57, at p. 59; Las Palmeras, American Court of Human Rights, Series C, *Decisions and Judgments*, No. 67, para. 38 (4 February 2000); *Erdogen v. Turkey*, Application No. 19807/92, 84 A, European Commission of Human Rights (1996), *Decisions and Reports*, p. 5, at p. 15; Amerasinghe, *Local Remedies*, *supra*, note 40, pp. 203-205; Kokott, *The Exhaustion of Local Remedies*, *supra*, note 31, p. 623.

[175] [1931] British-Mexican Claims Commission, 5 *U.N.R.I.A.A.* p. 191 at p. 198. See also *Administration of the Prince of Pless* (1933) *P.C.I.J. Series A/B, No.* 52, p. 16.

exhaust local remedies in the *Interhandel* case.[176] This aspect of the decision was criticized by Judge Armond-Ugon who, in a dissenting opinion, held that, as a final decision was not in sight after 10 years of litigation, the available remedies were too slow and hence ineffective.[177] In this case the Court did not reject the possibility that undue delay might lead to the relaxation of the local remedies rule. It simply did not consider 10 years as sufficient time to dispense with the rule *in this specific case*, particularly as Interhandel's failure to produce some of the necessary documentation had contributed to the delay.[178]

Academic opinion

98. While academic opinion is generally supportive of such an exception,[179] there is an awareness of the difficulty attached to giving an objective content or meaning to "undue delay". Each case must be judged on its own facts. As Amerasinghe states:

> "The circumstances of each case would certainly be a determining factor. Much would depend on the judicial assessment of the situation in each case. ... Clearly such matters as the nature of the wrong would be relevant, it being easier, for instance, to prescribe shorter time limits for violations of personal and civil rights than for injuries to property. The nature of the claimant may also be a pertinent factor, injuries to large corporations, which may give rise to more complicated cases than injuries to individuals, being subject to longer time-limits than injuries to individuals. In the ultimate analysis such considerations can only provide guidelines, there being no hard and fast rules defining undue delays."[180]

99. This exception to the exhaustion of local remedies rule might be accommodated in the exception contained in article 14 (a), as a component of futility. There are, however, good reasons for recognizing this as a separate exception. Court proceedings are notoriously slow. Such an exception would serve notice on States that they stand to lose the advantages of the local remedies rule if they unduly prolong domestic proceedings in the hope that the day of reckoning before an international tribunal will be delayed.

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[176] *Supra* note 14.

[177] Ibid., at p. 87.

[178] Amerasinghe, *Local Remedies*, *supra* note 40, p. 203.

[179] See, for example, Brownlie, *supra* note 45, pp. 505-506; Doering, *supra* note 59, p. 239; Schwarzenberger, *supra* note 20, vol. 1, pp. 620, 622 (mentioned in the context of denial of justice); Cançado Trindade, *Application*, *supra* note 40, p. 79; Jiménez de Aréchaga, General Course, *supra* note 86, p. 294; Jiménez de Aréchaga, International Responsibility, *supra* note 54, p. 589; and Mummery, *supra* note 37, p. 403.

[180] Amerasinghe, *supra* note 40, pp. 205-206. In the *El Oro Mining* case, the British Mexican Claims Commission stated: "The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render a judgement. This will depend upon several circumstances, foremost among them upon the volume of the work involved by a thorough examination of the case, in other words upon the magnitude of the latter" (*supra* note 175, p. 198).

5. Denial of access (article 14 (f))

Article 14
Local remedies do not need to be exhausted where:

...

(f) the respondent State prevents the injured individual from gaining access to its institutions which provide local remedies.

100. A State may prevent an injured alien from gaining factual access to its tribunals by, for instance, denying him entry to its territory or by exposing him to dangers that make it unsafe for him to seek entry to its territory. A foreigner determined to assert his rights against a State is seldom a welcome visitor. It is not uncommon, therefore, for such a State to exercise its undoubted right to deny entry to the foreigner or to make it clear to the foreigner that if he enters the State's territory his safety cannot be guaranteed. Factual denial of access to local remedies may possibly be covered by article 14 (a), but it is probably better to recognize this type of case as a special exception to the local remedies rule as the remedy may in theory be both available and effective but in practice will be inaccessible.

101. There is no clear support in State practice, jurisprudence or doctrine for treating this type of situation as a separate exception to the local remedies rule. Juliane Kokott in her report of 2000 on the "Exhaustion of Local Remedies" to the Committee on Diplomatic Protection of Persons and Property of the International Law Association has, however, proposed an exception to the local remedies rule where "the claimant is factually prevented from access to existing remedies".[181] In support of this proposal she states:

> "Futility for factual reasons particularly includes cases of danger for the life or limb to the applicant in the country where he would have to pursue the remedy. This can be due to a 'general atmosphere of hostility' towards nationals of other countries or it can be based on dangers regarding the alien in particular or a group of persons, provided those dangers are satisfactorily established. Other examples of factual futility are cases of obstructions and hindrances, denials of justice to the effect that the alien is denied access to courts, due to a practice or policy ordered or tolerated by the State."[182]

Kokott's proposal has its source in human rights jurisprudence,[183] but there is no good reason why it should not be extended, by way of progressive development, to the general principles of law governing the exhaustion of local remedies.

C. Burden of proof

Article 15

1. The claimant and respondent States share the burden of proof in matters relating to the exhaustion of local remedies in accordance with the principle that the party that makes an assertion must prove it.

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[181] Exhaustion of Local Remedies, *supra* note 31, p. 629.

[182] Ibid., at p. 624-625. See also Doering, *supra* note 49, p. 240.

[183] Exhaustion of Local Remedies, *supra* note 31, p. 624, notes 86-91; *Akdivar* v. *Turkey*, 99/1995/605/693, judgement of 16 September 1996, (1996-IV) *European Court of Human Rights, Reports and Decisions*, No. 15, p. 1192 at p. 1213, para. 73.

2. In the absence of special circumstances, and without prejudice to the sequence in which a claim is to be proved:

(a) the burden of proof is on the respondent State to prove that the international claim is one to which the exhaustion of local remedies rule applies and that the available local remedies have not been exhausted;

(b) the burden of proof is on the claimant State to prove any of the exceptions referred to in article 14 or to prove that the claim concerns direct injury to the State itself.

102. The burden of proof in international litigation relates to what must be proved and which party must prove it. There are no clear and detailed rules on the burden of proof in international law of the kind found in many national legal systems.[184] It is, however, generally accepted that the burden of proof is on the party which makes an assertion: *onus probandi incumbit ei qui dicit*. This may be either the plaintiff (*onus probandi actori incumbit*) or the defendant (*reus in exceptione fit actor*), as the burden of proof may shift during the course of the proceedings, depending on how parties formulate their assertions or propositions of law.[185] This practical,[186] rather than technical or formalistic approach to the burden of proof applies to litigation involving the exhaustion of local remedies.

103. Previous attempts at codification of the local remedies rule have not sought to formulate a rule on this subject. However, in her report to the International Law Association Committee on Diplomatic Protection of Persons and Property, Juliane Kokott has suggested the following rule on burden of proof:

"1. The claimant has to prove that he exhausted the local remedies or

2. that he was exempted from doing so.

3. The host State has to prove that (further) remedies existed which were not exhausted."[187]

104. There is a substantial body of jurisprudence on burden of proof to be found in the practice of human rights monitoring bodies.[188] Decisions of the European Court

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[184] *Parker* case (United States of America v. Mexico), (1926) 4 *U.N.R.I.A.A.* p. 35 at p. 39.

[185] G. Ripert, "Les règles du droit civil applicables aux rapports internationaux" (1933-II) 44 *Recueil des Cours* p. 565 at p. 646. See also P. Guggenheim, *Traité de droit international public* (1953), p. 81; B. Cheng, "Burden of proof before the I.C.J.", (1953), 2 *I.C.L.Q.* p. 595 at p. 596; Law, *supra* note 24, p. 55; J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (1965), p. 458; A. P. Sereni, *Principi generali di diritto e processo internationale* (1955), pp. 30, 40, 76, 90; J. Chappez, *La Règle de l'épuisement des voies de recours internes* (1972), pp. 234-237; Amerasinghe, *Local Remedies*, *supra* note 40, pp. 277-283; Cançado Trindade, *Application*, *supra* note 40, pp. 134-136, 169; G. Scelle, Draft on arbitral procedure, *Yearbook ... 1958, vol. II*, p. 1, document A/CN.4/113 (see especially article 21, pp. 9 and 14); Swiss submission in the *Interhandel* case, 1959 *I.C.J Pleadings*, pp. 562-563. *Sed contra* B. Robertson, "Exhaustion of Local Remedies in International Human Rights Litigation – The Burden of Proof Reconsidered" (1990), 39 *I.C.L.Q.* p. 191 at pp. 191-193, 196, who distinguishes between legal burden of proof and evidential burden of proof and claims that, with regard to the first, the burden remains with one party (i.e. the claimant).

[186] Gaja, *supra* note 118, pp. 227-231.

[187] Kokott, Exhaustion of Local Remedies, *supra* note 31, p. 630.

[188] J. Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (1998); Amerasinghe, *supra* note 40, pp. 291-297, Cançado Trindade, *supra* note 40, pp. 143-171; Robertson, *supra* note 185; *Velásquez Rodríguez* case, *supra* note 60, p. 305, paras. 59-60; *Akdivar v. Turkey*, *supra* note 183, p. 1211, para. 68.

of Human Rights indicate that the initial burden is on the applicant to demonstrate in his application with a reasonable degree of certainty that he has exhausted the local remedies provided by the host State. If the respondent State then claims that local remedies have not been exhausted, the burden of proof shifts to the respondent to satisfy the Court that there was an effective remedy available to the applicant which was capable of providing redress. Once this burden has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or that there were exceptional circumstances that absolved him from exhausting such remedies.[189]

105. The applicability of these principles to general international law is limited, as the sequence in which the allegations need to be proved is influenced by the fact that:

> "human rights conventions normally stipulate that an application is considered in substance by the relevant supervisory organ only if the latter is satisfied that the local remedies have been exhausted the way the convention requires."[190]

Moreover, human rights bodies may examine compliance with the rule of exhaustion of local remedies *ex officio/proprio motu*, even in the absence of any objection by the respondent.[191]

106. Arbitral and judicial decisions do not offer much clarity on the issue. While some arbitral tribunals have held that the burden should be on the claimant to prove that it has exhausted local remedies or that one of the exceptions to the rule applies,[192] others, assuming the ineffectiveness of the remedies from the circumstances of the case, have placed the burden on the respondent to prove the existence of local remedies which have not been exhausted.[193] The issue was addressed in the *Panevezys-Saldutiskis Railway* case, the *Finnish Ships Arbitration*, the *Ambatielos* claim and the *ELSI* case and was raised in the pleadings in the *Aerial Incident* (Israel v. Bulgaria) case and the *Norwegian Loans* case (in which Judge Lauterpacht delivered an important separate opinion on the subject).

107. In the *Panevezys-Saldutiskis Railway* case, the applicant, Estonia, claimed that the rule of exhaustion of local remedies did not apply on the ground that the Lithuanian courts could not entertain the suit because the highest court of Lithuania had already given a decision on the subject unfavourable to the applicant. Referring to these issues, the PCIJ stated that:

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[189] See, *Foti and Others*, *supra* note 112, pp. 380-382; *Selmouni v. France*, European Court of Human Rights, Application No. 25803/94, judgement of 28 July 1999 (the Netherlands intervening), available at http://www.dhcour.coe.fr/, p. 26, para. 76.

[190] Kokott, Exhaustion of Local Remedies, *supra* note 31, at p. 628.

[191] Cançado Trindade, *Application*, *supra* note 40, pp. 153-157.

[192] *Studer* claim (United States v. Great Britain) (1925) 6 *U.N.R.I.A.A.* p. 149 at p. 153; *La Guaira Electric Light and Power Co.* case (United States v. Venezuela) (1903-1905), 9 *U.N.R.I.A.A.* p. 240 at p. 243; *Napier* case, Moore, *International Arbitrations*, *supra* note 13, vol. 3, p. 3152 at p. 3154.

[193] See *In re Gill* case (United Kingdom v. Mexico) (1931-32) 6 *Annual Digest* pp. 203-204; *Forests in Central Rhodopia*, 7 *Annual Digest* p. 91 at p. 94, (1934) 28 *A.J.I.L.* p. 774 at p. 789; *Brown* claim, *supra* note 13. See also Judge Tanaka's separate opinion in *Barcelona Traction*, *supra* note 28, pp. 145-147.

> "If either of these points could be substantiated, the Court would be bound to overrule the second Lithuanian objection [concerning non-exhaustion of local remedies].
>
> "...
>
> "Until it has been clearly shown that the Lithuanian courts have no jurisdiction to entertain a suit by the *Esimene* Company as to its title to the *Panevezys-Saldutiskis* railway, the Court cannot accept the contention of the Estonian Agent that the rule as to the exhaustion of local remedies does not apply in this case because Lithuanian law affords no means of redress."[194]

These passages suggest that once the respondent has raised the objection that local remedies have not been exhausted, the burden lies on the applicant to prove that an exception to the local remedies rule is applicable.

108. In *Finnish Ships*, Arbitrator Bagge held that:

> "[the local remedies rule] can bear only on the contentions of fact and propositions of law put forward by the claimant Government in the international procedure and that the opportunity of 'doing justice in its own way' ought to refer only to a claim based upon these contentions."[195]

This unclear reasoning has been liberally interpreted by Law as placing

> "the burden of proof on the State bringing the case to the tribunal, for it refers to the exclusive reliance on the contentions brought by that State, which, if justified, would mean that local remedies are either non-existent or already exhausted."[196]

109. The *Ambatielos* case takes a different approach in suggesting that the initial burden of proof is on the respondent State to prove that there were effective remedies that were available and had not been exhausted:[197]

> "In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence, in its system of international law, of remedies which have not been used. The view expressed by writers and in judicial precedents, however, coincides in that the existence of remedies which are obviously ineffective is held not to be sufficient to justify the application of the rule."[198]

110. The *ELSI* case likewise provides authority for the proposition that the burden of proof is on the respondent State to prove the existence of an available remedy that had not been exhausted:

> "With such a deal of litigation in the municipal courts about what is in substance the claim now before the Chamber, it was for Italy to demonstrate that there was nevertheless some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny ...

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[194] *Supra* note 14, pp. 18-19.
[195] *Supra* note 13, p. 1502.
[196] *Supra* note 24, p. 56.
[197] Ibid., at pp. 56-57.
[198] *Supra* note 14, p. 119.

> "In the present case, however, it was for Italy to show, as a matter of fact, the existence of a remedy which was open to the United States stockholders and which they failed to employ. The Chamber does not consider that Italy has discharged that burden.
>
> "It is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been "exhausted". But in this case Italy has not been able to satisfy the Chamber that there clearly remained some remedy which Raytheon and Machlett, independently of ELSI, and of ELSI's trustee in bankruptcy, ought to have pursued and exhausted."[199]

111. In the *Aerial Incident* case, counsel for the respondent, Bulgaria, argued that once the respondent had shown that its courts were open and available to foreigners, it was incumbent on the applicant, Israel, to prove that these remedies were non-existent or ineffective.[200]

112. The burden of proof featured prominently in the pleadings of the *Norwegian Loans* case, but the Court was not required to decide on this subject. France argued that it was not incumbent on the French Government, as applicant/claimant, to prove the futility of Norwegian local remedies. On the contrary, it was for Norway to prove "the utility of recourse to its judicial organization".[201] In reply, Norway argued that there was a rule of international law obliging the claimant to exhaust local remedies before submitting the case to the Court:

> "If the French Government maintains that the principle is not applicable, it has the onus of establishing the reason why that is the case ..."[202] Accordingly, it is not for the Norwegian Government to prove that the means of recourse open to the French title holders under its domestic law offer the latter sufficient possibilities to ensure that the rule of prior exhaustion may not be set aside. The Government of the Republic has the onus of proving the opposite." [203]

Subsequently, Norway conceded that the respondent was required to prove the existence of domestic remedies, but claimed that the ineffectiveness of such remedies was to be proved by the applicant:

> "Once the *existence* of local remedies has been established, the rule of prior exhaustion comes into play. And if the applicant State wishes to avoid the consequences of that rule, it has the onus of proving that the rule does not apply *by reason of the ineffectiveness of existing remedies*."[204]

In response, France argued that there was an obligation on parties to collaborate in the presentation of evidence and that Norway could not simply allege that its courts were impartial. In addition, it was required to prove, in the light of the legislation that had led to the dispute, and which appeared to exclude the competence of local courts, that there was a reasonable prospect of redress before Norway's courts.[205]

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[199] Supra note 35, pp. 46-48, paras. 59-63. Emphases added.
[200] 1959 *I.C.J. Pleadings*, pp. 559, 565-566.
[201] *Supra* note 127, vol. I, pp. 183-184.
[202] Ibid., vol. I, p. 280, para. 110.
[203] Ibid., vol. I, p. 281, para. 114.
[204] Ibid., vol. II, p. 162. Emphasis in original. See also ibid., vol. II, p. 161.
[205] Ibid., vol. II, pp. 187-188.

113. In his separate opinion in the *Norwegian Loans* case, Judge Lauterpacht proposed the following scheme:

> "(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had;
>
> (2) No such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy;
>
> (3) In that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed;
>
> (4) The degree of burden of proof thus to be adduced ought not to be so stringent as to render the proof unduly exacting."[206]

While some authors have given uncritical support to Lauterpacht's formulation,[207] it must not be forgotten that it was intended to apply to the facts before the Court — that is, Norwegian legislation that *ex facie* seemed to render recourse to local remedies a futile exercise. Lauterpacht's exposition therefore "does not seem to be open to generalization."[208]

114. The burden of proving the effectiveness or ineffectiveness of local remedies has featured prominently in the literature, but the circumstances giving rise to the claim of ineffectiveness will differ from case to case. In one case the ineffectiveness of the local remedy may be apparent — as when there is legislation depriving the local courts of competence to hear the matter in question. In another case the ineffectiveness of the local remedy may be less obvious — where, for instance, it is alleged that the courts are biased or under the control of the executive. In the former case ineffectiveness may be presumed until rebutted by the respondent State, whereas in the latter it will be incumbent on the claimant State to prove its assertion.[209] This all points in the direction of a need for flexibility in the approach to the burden of proof.

115. Writers on the subject of burden of proof have generally been careful not to expound a detailed set of rules and sub-rules that will cover all situations.[210] While scholars have thoroughly analysed the available authorities, few venture beyond the generalization of Jiménez de Aréchaga that:

> "The State which objects to a claim by invoking the local remedies rule has to prove the existence of a remedy which has not been used. If the claimant State replies that an existing remedy is ineffectual or inadequate in the

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[206] *Supra* note 44, p. 39.

[207] Head, *supra* note 118, p. 155; O'Connell, *supra* note 20, vol. 2, p. 1058.

[208] T. Haesler, *The Exhaustion of Local Remedies in the Case Law of International Courts and Tribunals* (1968), pp. 57-59.

[209] Brownlie, *supra* note 45, p. 500; Law, *supra* note 24, pp. 57-58.

[210] C. F. Amerasinghe writes:

> "The subject is, however, nebulous at present in certain of its aspects, because it has not been considered judicially with any completeness. Since the burden of proof is a matter pertaining to litigation, the importance of judicial precedent relating to it cannot be underestimated. Significantly, therefore, although text writers agree that there is a distribution of the burden of proof, it is neither possible nor desirable to lay down any specific rules for such distribution beyond those already established and referred to above" (*Local Remedies*, *supra* note 40, pp. 287-288).

circumstances of the case, this State has to prove the correctness of such an allegation."[211]

116. The burden of proof is largely dependent on the division of roles in the litigation (i.e. which party raises what issue), which, in turn, is largely dependent on the circumstances of the case. For instance, if the case is brought to an arbitral tribunal by both parties together, based on a *compromis* which implies a waiver of the rule, the claimant would be unlikely to present proof in its original submission to the effect that it has exhausted all available and effective remedies. In this case, the issue would be raised first by the respondent, and the burden of proof would be on this party to demonstrate the existence of local remedies and the applicability of the rule to the case. In contrast, if, in the same situation, the original injury in the specific case relates to a contract between the alien and the respondent State containing a Calvo Clause stipulating that the alien waives his rights to diplomatic protection, the respondent State would arguably be able to shift the burden of proof by merely referring to the Clause.[212] Moreover, if the claim is brought under an instrument which expressly requires the exhaustion of local remedies, the division of the burden of proof would be completely different. The claimant State would be obliged to show in its submission that it had exhausted existing local remedies, or to show why this was not necessary. In response, the respondent Government would be required to point to further remedies and to demonstrate their effectiveness to support its objection concerning the non-exhaustion of local remedies.

117. For the above reasons the only conclusion that can be drawn from the examination of cases and the literature is that it is difficult — and unwise — to state any concrete rule other than that the burden of proof should be shared by the parties, shifting between them continuously throughout the case, and that the burden lies on the party which makes a positive claim to prove it: *onus probandi incumbit ei qui dicit*. Article 15 seeks to give effect to this.

118. The Commission may take the position that article 15 (1) is a general principle that is not subject to codification. In this case it may prefer to simply codify article 15 (2). Alternatively, it may prefer to adopt the short, but not inaccurate, proposal made by Juliane Kokott to the International Law Association, referred to in paragraph 103.

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[211] General Course, *supra* note 86, p. 295. See also Jiménez de Aréchaga, "International responsibility", in M. Sørensen (ed.), *Manual of Public International Law* (1968), p. 531 at p. 590; and *Oppenheim's International Law*, *supra* note 53, vol. 1, p. 526.

[212] See *North American Dredging Company of Texas* (United States v. United Mexican States), decision of 31 March 1926, reproduced in (1926) 20 *A.J.I.L.* p. 800 at p. 807, paras. 20-21.